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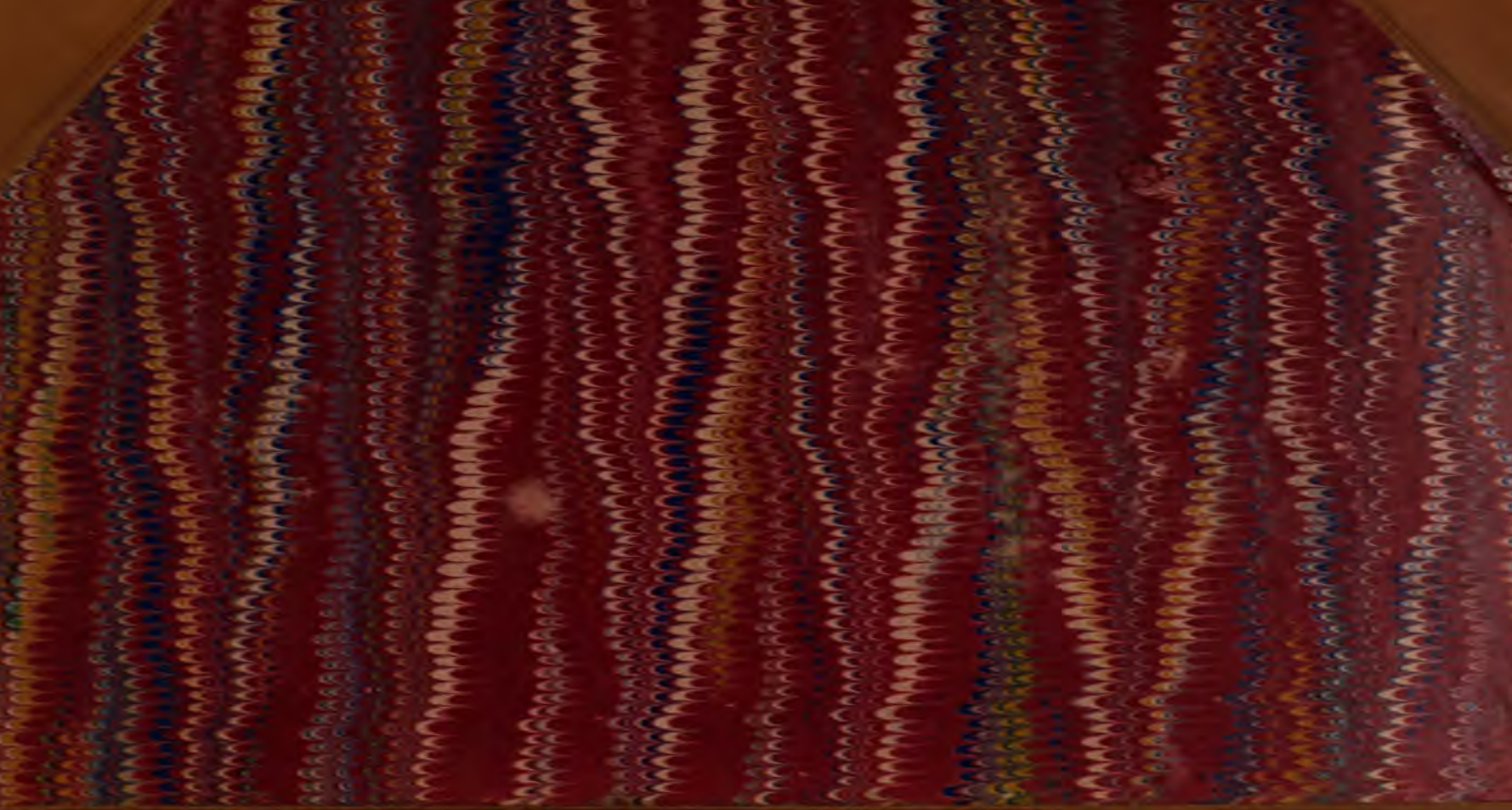

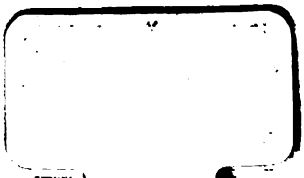
TORONTO, ONT.

THE

MONTREAL LAW REPORTS.

COURT OF QUEEN'S BENCH.

JAMES KIRBY, Editor.

CASES DETERMINED IN THE COURT OF QUEEN'S BENCH, MONTREAL.

1888.

(With some cases of previous years.)

CONTRIBUTORS: *(Reports distinguished by initials.)* JAMES KIRBY, H. J. KAVANAGH, EUGENE LAFLEUR, N. T. RIELLE, K. R. MACPHERSON, A. B. MAJOR.

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1888.

JUDGES

OF THE

COURT OF QUEEN'S BENCH.

1888.

THE HON. SIR ANTOINE AIMÉ DORION, KT., *Chief Justice.*

" SAMUEL CORNWALLIS MONK,
" ULRIC JOSEPH TESSIER,
" ALEXANDER CROSS,
" LOUIS FRANÇOIS GEORGES BABY,
" L. RUGGLES CHURCH,
" JOSEPH G. BOSSE.

} *Puisne Judges.*

Attorney General:

THE HON. A. TURCOTTE, Q.C.

Clerk of Appeals:

L. W. MARCHAND.

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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH

IN APPEAL,

MONTREAL.

January 27, 1888.

Coram TESSIER, CROSS, BABY, CHURCH, DOHERTY, JJ.

LA CITÉ DE MONTRÉAL
(*Plaintiff in Court below*),
APPELLANT;

AND

LES ECCLÉSIASTIQUES DU SÉMINAIRE DE ST. SULPICE DE MONTRÉAL
(*Defendants in Court below*),
RESPONDENTS.

City of Montreal—41 *Vic.* (Q.) *ch.* 6, *s.* 26—*Municipal taxes—Local assessment for local purposes—Educational Institution—Exemption.*

HELD:—(Reversing the judgment of the Superior Court, M. L. R., 2 S. C. 265), that the assessment imposed on the proprietors benefited, for the cost of a work of a local character and for the benefit of properties in a particular section of the City of Montreal, is not a municipal tax within the meaning of 41 Vict. (Q.), ch. 6, s. 26, but is of the nature of a local assessment for local purposes, and as such does not come under the exemption from municipal taxes accorded to educational institutions by the statute above cited.

The appeal was from a judgment of the Superior Court,

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Montreal (LORANGER, J.), December 31, 1885, which is fully reported in M. L. R., 2 S. C. 265-270.

The *considérants* of the judgment of the Superior Court were as follows:—

" La Cour, etc...

" Attendu que la demanderesse réclame, par son action, une taxe spéciale pour la construction d'un égout en face de la propriété des défendeurs;

" Attendu que les défendeurs ont plaidé que la propriété en question était, à l'époque où cet égout a été construit, possédée et occupée comme maison d'éducation ne recevant aucune subvention de la municipalité de Montréal; que cette propriété était alors, comme elle l'est encore aujourd'hui, exempte des taxes municipales, et notamment de la taxe réclamée;

" Attendu que les parties se sont donné des admissions sur les faits, et qu'il ne reste que la question de responsabilité à juger;

" Considérant qu'aux termes de la section 26 du chapitre 6 de la 41 Vict., les maisons d'éducation qui ne reçoivent aucune subvention de la corporation ou municipalité où elles sont situées, ainsi que les terrains sur lesquels elles sont érigées et leurs dépendances, sont exemptes des cotisations municipales et scolaires, quel que soit l'acte en vertu duquel ces cotisations sont imposées, et nonobstant toutes dispositions à ce contraires;

" Considérant que, bien que la demanderesse soit régie par un acte spécial, cependant elle est soumise, quant à l'exemption ci-dessus, aux dispositions du dit acte qui est postérieur à la charte de la dite demanderesse;

" Considérant que les termes du statut sont généraux et proclament l'exemption de toutes taxes quelconques;

" Considérant que l'impôt réclamé des défendeurs est une taxe qui, suivant l'interprétation du Code Municipal, article 19, section 22, donnerait ouverture à l'exemption réclamée par les défendeurs;

" Considérant que la défense des défendeurs est bien fondée;

" Renvoie l'action de la demanderesse avec dépens, distraits, etc."

Nov. 19, 1887.]

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R. Roy, Q. C., for the appellant :—

La question soulevée par la présente contestation est d'autant plus importante, en ce qui concerne le trésor municipal, que de sa solution dépend nombre de réclamations de même nature que la Cité est en frais de recouvrer ; en effet, si la prétention adverse est maintenue, non seulement les maisons d'éducation, mais les églises, les presbytères, les maisons de charité et autres établissements désignés dans la charte de la dite Cité (37 Vict., ch. 51), seront désormais affranchis du devoir de contribuer leur quote-part des améliorations locales qui auront été poursuivies dans leur intérêt, et dont l'exécution aura augmenté la valeur, tandis que cette quote-part sera mise à la charge des autres propriétaires de la localité en sus de ce qu'ils auront à supporter pour leurs immeubles.

Il faudrait une loi bien claire et bien précise pour justifier une telle interprétation, mais non-seulement l'on ne peut en citer, mais celle qui régit la matière, 41 Vict., ch. 6, s. 26, est loin de supporter pareille prétention.

D'après l'acte cité, les termes de l'exemption sont vagues et indéterminés, les maisons d'éducation sont déclarées exemptes des *cotisations municipales et scolaires* ; veut-on conclure de là que la Législature a entendu comprendre dans cette catégorie, les répartitions faites pour améliorations locales telles qu'élargissement ou ouverture de rues ou de places publiques, la construction d'égouts, de trottoirs, etc. ? Oui, dit l'Honorable Juge qui a prononcé le jugement dont est appel, et il s'est apparemment appuyé sur l'article 19, paragraphe 22 du Code Municipal, pour fonder son opinion.

Or, indépendamment de ce que ce code n'est pas loi dans les limites de la Cité de Montréal, il existe, dans la charte même de cette Cité, telle qu'amendée, des dispositions qui démontrent que son rédacteur a constaté une distinction essentielle entre les *cotisations* et les *répartitions*, et que c'est en vue de cette distinction qu'il a promulgué diverses exemptions : ainsi la s. 3 de 38 Vict., ch. 73, dit :

" Les Eglises, presbytères et palais épiscopaux sont ex-

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" empts *de toutes taxes*. Les établissements occupés pour " des fins de charité sont exempts des *taxes municipales or-* " *dinaires* et *annuelles*."

Cette dernière désignation prouve clairement que l'on n'a pas voulu donner à ces établissements l'immunité contre les répartitions, tandis que d'après la définition du Code Municipal, *loc. cit.*, les mots *taxe municipale* comprennent non-seulement les taxes ou répartitions de toute nature, mais toutes redevances, amendes ou pénalités, etc. En référant à la Charte, on verra que cette confusion entre les différentes taxes, redevances, licences, amendes ou pénalités, les réduisant toutes sous la même appellation, n'existe pas, mais au contraire, que chacun de ces sujets est réglementé d'une manière distincte ; et si dans la Province de Québec, qui est régie par le Code Municipal, la définition des mots *taxe municipale* est applicable, elle est entièrement sans force et effet dans la Cité de Montréal, où la règle est diamétralement opposée.

Que l'on veuille bien remarquer que la répartition dont l'effet est de mettre à la charge de chacun une part du coût d'une amélioration, suivant l'avantage que son immeuble en retire, n'est pas une *taxe* dans le vrai sens du mot ; les auteurs disent que la *taxe* est une redevance à laquelle tous les membres d'une corporation contribuent pour l'avantage et dans un intérêt général, tandis que la répartition est la quote-part que les propriétaires d'une localité plus ou moins restreinte, selon l'étendue du bénéfice, ont à payer en proportion de la plus-value donnée à leurs immeubles. De nombreuses décisions reposant sur cette distinction ont été prononcées dans ce sens par les tribunaux des Etats-Unis où, il faut bien l'admettre, la théorie du gouvernement municipal est parfaitement comprise, quoique l'on puisse trouver à redire à la façon dont elle est en certains endroits mise en pratique.

Dans l'espèce, il ne s'agit que de l'interprétation juridique de termes généralement employés en matière municipale, et je ne crois pas qu'il y ait à ce sujet de guides plus sûrs que les juges éminents qui, dans le pays voisin, ont, en maintes occasions, jugé que l'exemption de *toutes*

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taxes n'incluait pas les *répartitions* (*special* ou *local assessments*) ; dans la province d'Ontario, le Juge en chef Harrison, dont l'autorité et les connaissances en droit municipal sont si hautement reconnues, a donné son entière adhésion à cette doctrine, fondée qu'elle est sur le principe que les exemptions sont de droit strict, ne sont point sujettes à extension, et doivent être interprétées rigoureusement.

Autorités :—Harrison's Mun. Man., p. 608, note *b* et seq., et p. 611, note *e.* ; 2 Dillon, Mun. Corp., p. 717 à 720, 719 *à* note, Nos. 616-617 ; Cooley, Taxation, p. 146 et seq., et notes ; cite *Lord Coke* on word *Talliage* ; Angell, Highways, p. 196, nos. 172-173 ; 11 John's Rep., N.-Y., p. 77, *Exparte Mayor of New-York & Nassau St.* ; 4 Zabriskie's R. p. 385 à 400, *Paterson* v. *Manufacturers, etc.* ; Hilliard, Taxation, p. 72, § 5, p. 74-75 ; Burroughs, Taxation, p. 113, § 67 ; 38 Vict. (Q.), ch. 73, § 3 ; 41 Vict. (Q.), ch. 6, s. 26 ; Code Mun., art. 19, par. 22.

Geoffrion, Q.C., for the respondents :—

La question à décider est celle de savoir si les maisons d'éducation et les terrains sur lesquels elles sont érigées, ainsi que leurs dépendances, sont exemptes des cotisations spéciales que la Cité de Montréal est autorisée à prélever sur certains propriétaires, pour leur proportion dans le coût d'améliorations faites dans les rues en face des propriétés ainsi occupées pour les fins de l'éducation.

Des admissions signées par les parties définissent clairement les faits. La propriété sur laquelle la Cité de Montréal cherche à prélever une taxe spéciale est occupée comme maison d'éducation et ne reçoit aucune subvention de la corporation municipale. Par les mêmes admissions il appert aussi que si les exemptions n'existent pas, l'action de l'appelante doit être maintenue ; l'exemption est réclamée par les intimés en vertu de la 41 Vict. ch. 6, s. 26, des statuts de la Province de Québec, qui se lit comme suit : " Toutes maisons d'éducation qui ne reçoivent au- " cune subvention de la corporation ou municipalité où " elles sont situées ainsi que les terrains sur lesquels elles " sont érigées et leurs dépendances, seront exemptes des

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" cotisations municipales et scolaires, quelque soit l'acte " ou charte en vertu duquel ces cotisations sont imposées, " et ce nonobstant toutes dispositions à ce contraires." Cette disposition nouvelle a été ajoutée à la section 77, sous-section 2, du chapitre 15 des statuts refondus du Bas-Canada. Jusqu'à cet ajouté la loi n'exemptait les maisons d'éducation que des cotisations scolaires, et se lisait comme suit : "Tous les bâtiments consacrés à l'édu- " cation ou au culte religieux, presbytères et toutes insti- " tutions charitables ou hôpitaux incorporés par acte du " parlement, et le terrain ou emplacement sur lequel ils " sont érigés, ainsi que les cimetières, seront exempts de " la cotisation imposée pour les fins de cet acte."

L'appelante prétend que l'exemption établie par la loi telle que citée plus haut ne s'applique qu'aux taxes ou cotisations d'une nature générale et non pas aux cotisations spéciales de la nature de celles réclamées en la présente instance. Il est bon de mettre sous les yeux de la cour les différents textes de loi établissant les exemptions de taxes afin de mieux faire saisir la portée des expressions dont s'est servi le législateur dans la loi invoquée en faveur des intimés. La cotisation imposée par l'appelante est autorisée par la 37 Vict., ch. 51, s. 123, s. s. 42, qui se lit comme suit :

123. Le conseil de la dite cité pourra faire des règlements pour les objets suivants, savoir : ..... 42. " Pour " régler le drainage de la cité, et pour cotiser les propriéta- " taires de biens-fonds, au montant de toute somme qui " sera nécessaire pour défrayer le coût de la construction " d'aucun égout commun dans toute rue de la cité, et " dans laquelle tels propriétaires possèdent des biens- " fonds, pour régler la manière dont cette cotisation sera " faite, prélevée et payée."

Dans une disposition amendant la charte de la cité appelante, de date antérieure ; 38 Vict., ch. 70, s. 3, certaines exemptions sont établies. Le texte créant ces exemptions quoique ne s'appliquant pas à la classe de propriétaires dont il s'agit en cette cause doit être cité ici pour servir de terme de comparaison à l'appui de notre interprétation

de la loi qui régit notre cas: " Les églises, presbytères et " palais épiscopaux sont exempts de toutes taxes. Les " établissements occupés pour des fins de charité sont " exempts des taxes municipales ordinaires et annuelles."

Toujours dans le but de nous servir à l'appui de notre interprétation, d'autres dispositions analogues à titre de contextes, nous citons encore le Code Municipal, art. 19, par. 22, qui dit: ' Le terme ' taxe municipale ' désigne et " comprend: 1o. toutes taxes et contributions en deniers " imposés par les conseils municipaux ou en vertu de " procès-verbaux ou d'actes de répartitions..... Le Code Civil à l'article 2009, se lit comme suit: " Les créances " privilégiées sur les immeubles sont ci-après énumérées et " prennent rang dans l'ordre qui suit:...5o. Les cotisations " et répartitions." Par l'article 2011, C. C. les cotisations et répartitions privilégiées sur les immeubles, sont:..... " 3o. Les cotisations municipales....." Nous référons encore, comme nouvel exemple que les termes, taxes ou cotisations employés généralement comprennent les cotisations spéciales comme les générales, à la charte de la ville de Longueuil, 44-45 Vict., ch. 75, ss. 229, 230.

Comme l'on voit, dans ces différents textes de loi les mots taxes et cotisations sont employés indifféremment par le législateur pour exprimer la même chose. Il nous semble qu'en face de la sect. 3 du chapitre 73 de la 38 Vict., il est impossible à l'appelante de pouvoir prétendre que l'expression générale " taxes ou cotisations " ne comprend que les taxes et cotisations annuelles et ordinaires et ne peut pas s'appliquer aux taxes spéciales. Il est indifférent que l'on se serve des expressions " seront exemptes des taxes ou cotisations " ou des expressions " seront exemptes de toutes taxes ou cotisations "; les deux manières de s'exprimer sont aussi générales l'une que l'autre.

L'appelante appuie ses prétentions sur des décisions étrangères plus ou moins contradictoires; elle a surtout recours à la jurisprudence américaine. L'auteur le plus accrédité sur cette question, aux Etats-Unis, Cooley a résumé la doctrine américaine dans l'axiome suivant: " *Ex-*

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emptions are presumed lo be in the public interest in relief of the public burthens."

C'est en suivant cette règle qu'aux Etats-Unis l'on a restreint l'exemption lorsqu'elle était accordée à des corporations privées ou à des corporations composées d'une section seulement du corps des contribuables, telles que les églises et les corporations instituées pour une certaine classe du public. Cette raison d'interprétation cesse dans le cas où l'exemption s'applique à une institution à la charge du public en général, ce qui a lieu pour les maisons d'éducation, l'éducation dans la province de Québec étant à la charge et sous le contrôle de l'Etat. Les exemptions accordées aux maisons d'éducation doivent donc être considérées comme étant dans l'intérêt public en général et non pas dans l'intérêt d'une section du public en particulier.—Taxer soit directement, soit indirectement, soit par voie de cotisations générales ou cotisations spéciales, une maison d'éducation, c'est donc payer de la main droite pour recevoir de la main gauche ; c'est le public représenté par un certain pouvoir organisé prélevant des cotisations sur un établissement que le même public est obligé de maintenir. Quand même ces cotisations ou taxes sont pour travaux dans les rues, vis-à-vis les propriétés possédées par les maisons d'éducation, on ne peut pas dire que c'est un établissement particulier s'enrichissant aux dépens du public, c'est le public s'enrichissant à ses propres dépens ; c'est-à-dire qu'il revient au même pour les contribuables de payer le coût des travaux spéciaux sans prélever sur la maison d'éducation que les contribuables sont obligés d'entretenir ; car si cette maison d'éducation était obligée de payer sa part de l'amélioration publique, les administrateurs de cette propriété publique pour obtenir les moyens de faire ce paiement, seraient obligés de prélever sur le même public. Dans le cas des intimés, il est bien vrai que l'établissement est entretenu entièrement par eux, mais ceci ne change pas les raisons qui ont fait établir cette exemption, ni l'application de cette loi. La loi a été faite pour toutes les maisons d'éducation ne recevant pas de subvention de la cor-

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poration ou municipalité où elles sont situées. Parce que des particuliers jugent à propos d'entretenir à leurs propres dépens une maison d'éducation, cette maison ne doit pas être traitée d'une manière moins favorable que si elle était entretenue par le public. C'est le public qui bénéficie de cette générosité et le législateur n'a pas voulu que l'on pût taxer un semblable établissement.

La loi en vertu de laquelle les intimés réclament leur exemption n'a pas été faite pour une section du pays en particulier, mais est aussi générale que possible. Quel que soit l'acte ou charte en vertu de laquelle ces cotisations sont imposées, et ce nonobstant toutes dispositions à ce contraire, dit le statut ; la même règle s'applique donc dans le territoire de la Cité de Montréal, comme elle s'appliquerait dans le reste de la Province.

Prenons le Code Municipal, qui gouverne la plus grande partie de la province, l'on voit que l'article 712 établissant les exemptions de taxes municipales, ne fait aucune distinction entre les cotisations générales et les cotisations spéciales ; or comme nous l'avons déjà fait voir par l'article 19, paragraphe 22 de ce Code, le terme " taxes municipales " généralement employé, comprend les taxes et contributions imposées soit par les conseils municipaux pour leurs besoins généraux, soit en vertu de *procès-verbaux ou d'actes de répartitions*. Ces dernières expressions font voir que les exemptions posées par l'article 712 s'appliquent aussi bien aux répartitions spéciales qu'au rôle de cotisations générales. L'article 713 contient une exception concernant les travaux d'entretien sur les chemins de front situés en face des biens exempts dans les municipalités locales où ces chemins ne sont pas à la charge de la corporation, mais, si ces mêmes sont à la charge de la municipalité, alors l'exemption a son entière application.

Les travaux dont le coût est demandé par l'appelante sont à sa charge aux termes de sa charte, sauf à en prélever le coût sur les propriétés non exemptes d'imposition.

L'appelante avait fait une réponse en droit à l'encontre de la défense des intimés ; cette réponse en droit a été

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renvoyée par Son Honneur le Juge Torrance, dont le jugement est rapporté au 1er volume du "Montreal Law Reports" C. S., page 450. Comme les mêmes moyens étaient contenus dans une réponse au mérite et afin de rendre l'appel plus facile, l'appelante s'est désistée de sa réponse en droit, les parties ont été entendues de nouveau sur le mérite devant Son Honneur le Juge Loranger qui a rendu le jugement dont est appel.

CHURCH, J., (for the majority of the Court):—

The action is brought to recover from the respondents (defendants in the Court below) the sum of $361.90, being one-half of the cost of a certain drain made by the Corporation in front of the respondents' property bearing the cadastral number 1717.

The defendants pleaded they were, under the provisions of the law 41 Vic., cap. 6, sec. 26, amending C. S. L. cap. 15, sec. 77, exempt from all municipal and scholastic taxation.

The parties are agreed as to the facts of the case, and the only question to be decided is one of law, viz., the interpretation of the statutes just cited.

The judgment of the Court below maintained the pretensions of the defendants (respondents) and declared the property exempt.

In determining the question raised in this action certain well-defined principles must constantly be kept in mind in determining the true intent, scope and meaning of the statutes invoked by the defence as well as those relied upon by the plaintiff.

It is not contested, and indeed it could not be, that the charter of the city of Montreal does not confer general as well as special powers of taxation and assessment; that these powers may be exercised over the whole of the rateable property of the municipality for general purposes —for sect. 78 of the charter provides that it shall be lawful for the said Council to make by-laws for the imposition and levy of an annual assessment on all real and personal property, or both, in the said city, or upon the

owners or occupiers thereof for a sum not exceeding 30 cents for every four dollars of the assessed yearly value, and sect. 79 provides it shall be payable annually; or even for special purposes,—*vide* sub-sect. 42 of sect. 123, which says: "The said Council may make by-laws to regulate "the sewerage of the said city, and to assess proprietors "of real estate to such amount as may be necessary to de- "fray the expenses of making any common sewer in any "street of the city, in which such proprietors own pro- "perty, and for regulating the mode in which such assess- "ment shall be made, collected and paid."

It is thus made clear that the great burden of taxation is imposed and levied annually, and made to conform to the wants of the different branches of the municipal service, as determined by fixed statutory rules to be found in the charter; and that the amount to which such taxes may be imposed has a well-defined limit, and finally that by 38 Vic., cap. 73, sect. 3, certain classes of property within the city limits, "churches, parsonages and bishops' palaces "are exempt *from all taxes*;" and further by the same section, that "institutions occupied for charitable objects" are exempt from municipal, ordinary and annual taxes.

All this is perfectly clear and easy, but it is contended that 41 Vic. cap. 6, sect. 26, which is subsequent to 38 Vic. cap. 73, amends the law. It is couched in the following terms: "Every educational institution receiving "no grant from the corporation or municipality in which "they are situated, and the land on which they are erected "and its dependencies shall be exempt from municipal and "school taxes, whatever may be the act or charter under "which such taxes are imposed, notwithstanding all pro- "visions to the contrary."

Now, it is contended on the one side that this statute, if it applies to the city of Montreal, and it is not contended that it does not, only extends to ordinary municipal annual assessments for general purposes, and not to local assessments for special local improvements or advantages such as is the work (drain) which it is sought to make the respondents liable for by the present action; that a

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well understood distinction exists betwen the two kinds of municipal burdens, that that distinction was clearly drawn in the form of words used in 38 Vic., cap. 70, where "*churches, parsonages and bishops' palaces*" were exempted from "*all taxes*" in an act specially applicable to the city of Montreal, and amendatory of its charter, and "*institutions* (by the same act and clause) *occupied for charitable objects,*" only exempted from "municipal, ordinary and annual taxes; that throughout the body of the charter of the city constantly recurring distinctions are drawn between taxes and assessments, and that in the interpretation of the Act 41 Vic., cap. 6, sect. 26, this distinction must be carefully made and constantly drawn in applying it to this case and to the charter of the city;—whilst on the other side it is just as strongly contended that the words of the statute 41 Vic., cap. 6, sect. 26, are so clear and comprehensive, that the exemptions therein named are so unlimited and unqualified, that no municipal nor scholastic tax or imposition of any kind can be put upon the respondent's property.

These rival pretensions impose upon this Court the decision of the questions: Are the words municipal and school taxes comprehensive of all the taxing powers of the corporation, or are they to be restricted to the imposition of the ordinary annual municipal and school rates annually imposed, and exclusive of local assessments for local purposes or local advantages? I think they are to be interpreted in a restricted sense. And I am strengthened in the conclusion at which I have arrived by some observations to be found in Maxwell on the Statutes, page 66, where, speaking of their interpretation, he says: "One of "these presumptions, especially applicable to the inter- "pretation of general words, is this, that the Legislature "does not intend any alteration in the law beyond what "it explicitly declares, either in express terms or by unmis- "takeable implication, or, in other words, beyond the im- "mediate scope and object of the statute. In all general "matters beyond, the law remains undisturbed. It is in "the last degree improbable that the Legislature would

" overthrow fundamental principles, infringe rights, or " depart from the general system of law, without expres- " sing its intention with irresistible clearness, and it " would, therefore, be absurd to give any such effect to " general words, simply because in their widest and most " abstract sense they admit of such an interpretation. It is, " therefore, an established rule of construction that general " words and phrases, however wide and comprehensive " in their literal sense, must be construed as bearing only " on the immediate object of the Act, and not altering the " general policy of the law, unless of course, no reasonable " sense can be applied to them consistently with the in- " tention of preserving that policy untouched."

This statute, 41 Vic. cap. 6, is dealing *not* with the amendment of the charter of the city of Montreal as was the Act 38 Vic., cap. 73, but with the laws respecting public instruction; it provided for the exemption of certain properties from municipal taxation and scholastic taxation in the interests of certain educational institutions essentially private in their nature and not receiving a grant from the municipality in which they were situate, but I do not think it was thereby intended to remove them from municipal control to the extent that they might not be subject to the police control of the city in the interests of the health of the citizens; that if it became necessary to drain them or to open a street through them, or to lay a sidewalk in front of them, whereby their value would be increased, the cost of so doing would have to be borne by others than they who were benefited. This would be to tax A for the benefit of B; or to take a burthen off A and to impose it on the whole community when the benefit was essentially, if not wholly, A's. It has the flavor and color of communism, since it enforces a contribution from others, and diminishes their estate to the advantage of such favored individual. It is the expropriation of one man's estate or wealth, and handing it over to another; for taxation is but another word for expropriation—in a certain and limited sense.

It appears to me that in the case under consideration

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we have to deal not with a case of taxation properly so called, but with a special assessment for a special purpose, and I think the authors are all agreed that a well defined and generally accepted distinction exists between them. Cooley, on taxation, page 606, says: "Special assessments "are a peculiar species of taxation, standing apart from "the general burdens imposed for state or municipal pur- "poses, and governed by principles that do not apply un- "iversally. The general levy of taxes is understood to "exact contributions in return for the general benefits of "government, and it promises nothing to the persons "taxed beyond what may be anticipated from an admi- "nistration of the laws for individual protection and the "general public good. Special assessments, on the other "hand, are made upon the assumption that a portion of the "community is to be specially and peculiarly benefited in "the enhancement of the value of property peculiarly si- "tuated as regards a contemplated expenditure of public "funds; and in addition to the general levy, they demand "that special contributions, in consideration of the special "benefit, shall be made by the persons receiving it. The "justice of demanding the special contribution is sup- "posed to be evident in the fact that the persons who are "to make it, while they are made to bear the cost of a "public work, are at the same time to suffer no pecuniary "loss thereby; their property being increased in value "by the expenditure to an amount at least equal to the "sum they are required to pay. This is the idea that "underlies all these levies. The distinction between "them and ordinary taxation has thus been pointed out 'in a recent case. A local assessment can only be levied "on land, it cannot, as a tax can, be made a personal "liability of the tax payer, it is an assessment on the "thing supposed to be benefited. A tax is levied on the "whole state or a known political subdivision, as a county "or a town. A local assessment is levied on property "situated in a district created for the express purpose of "the levy, and possessing no other function or even ex- "istence, than to be the thing on which the levy is made.

"A tax is a continuing burthen, and must be collected at "stated short intervals for all time, and without it gov- "ernment cannot exist; a local assessment is exceptional "both as to time and locality,—it is brought into being "for a particular occasion, and to accomplish a particular "purpose, and dies with the passing of the occasion and "the accomplishment of the purpose. A tax is levied, col- "lected and administered by a public agency, elected by "and responsible to the community on which it is im- "posed; a local assessment is made by an authority *ab* "*extra*. Yet is like a tax in that it is imposed under an "authority derived from the legislature, and is an en- "forced contribution to the public welfare, and its pay- "ment may be enforced by the summary method allowed "for the collection of taxes. It is like a tax in that it "must be levied for a public purpose, and it must be ap- "portioned by some reasonable rule among those upon "whose property it is levied. It is unlike a tax in that "the proceeds of the assessment must be expended in an "improvement from which a benefit clearly exceptive "and plainly perceived must inure to the property upon "which it is imposed. Not all these differences (Cooley "adds) are necessarily existent in every case, but in the "main the characterization is accurate as it is forcible."

In *Kirby* v. *Shaw* (19 Pa. St. 258) it is laid down that "the principle upon which rests that numerous class of "statutes which charge lots of ground with the expense "of paving and grading the streets in front of them is "that the value of the lots is enhanced by the public ex- "penditure."

Chief Justice Shaw, in *Wright* v *Boston*, 9 Cush. 233-241, a drain case, says:—"All these municipal taxes for im- "provement of streets rest for their final reason upon "the enhancement of private properties."

In *Hayden* v. *Atlanta*, 70 Ga. 817, it was said:—"A law "for an assessment for paving and grading a street (and "*a fortiori* the making of a drain, as it appears to me,) "and imposing one-third the cost on the adjacent pro- "perty, is not to be regarded as a law imposing a tax,"

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and is not forbidden by the requirement that taxation shall be by value. Many other similar decisions will be found quoted or referred to in Harrison's Municipal Manual, at pages 608 to 612, but it is unnecessary to quote more. Any person desiring to see them can find them by the reference above given.

It is said by the respondent that American decisions are not of much value in our courts in these cases, but it appears to me they are of very great value indeed. Firstly, because the American people are engaged in working out a municipal system very similar to ours, have made very great and successful progress in so doing, and in most instances are so working out their institutions and illustrating the limitations and restrictions of the taxing power under constitutional limitations requiring uniformity or other similar restriction, and hence special assessments are with much greater difficulty imposed and much more rigidly enquired into by the courts when their validity or constitutionality is attacked, than they are here where our constitution contains no such limitations.

It has been also urged that education in this province is undertaken by and controlled by the State. This in a sense is true, but under our constitutional system and under our educational laws the control of the state beyond the moneying out of the annual grants of the legislature and giving effect to carefully drawn acts intended to guide the executive, is not very marked or important. Every act is the subject of direct legislative enquiry and responsibility, and the control by the people through their representatives in parliament leaves little to the State beyond what the people have indicated it is their will and pleasure should be done.

Finally, I must say that I do not find any help, as did the honorable judge in the Court below, on referring to the Municipal Code, in determining what is meant by the term "municipal tax" in the Act under consideration, in so far as the city of Montreal is concerned, for the first article of the Code excludes its application to the cities, and the section 19 declares that special words and special

forms of words shall have the meaning and signification assigned to them so far and where such code rules, but obviously not elsewhere.

I think, therefore, I am justified in concluding, in view of the generality of expressions used by the legislature when delegating one of the sovereign powers, viz., the power of taxation, to the said city, in view of the special authority given it, to decide upon, amongst other special powers, that of drainage and to assess the cost of such works upon the properties benefited or supposed to be specially benefited, and in view of the fact that there is nothing in the Act 41 Vict., chap. 6, which goes to show that it was intended to place the burden of recouping the city for the cost of such improvement (drainage) on the whole body of citizens and to take it off those upon whom the charter of the city had placed it, as being benefited by it; and in further view of the fact that the amendment to the City charter, 38 Vict., chap. 73, when specially dealing with exemptions, practically recognized that there were some properties in the city which should be exempt from all taxes and others only exempt from some, and in view of the fact that the property taxed in this controversy does not come within the first named class; and also in view of the fact that such distinction, under the municipal legislation of the province of Ontario (a legislation, generally speaking, not dissimilar to our own) has been recognized and drawn by the Courts (*Haynes* v. *Copeland*, 28 U. C. C. P., 150), and apparently to make the subject of exemptions clear, they have made use of the terms, *municipal*, *local* and *direct*, which form of expression does not exist here; in view, as before said, of the fact that the same distinction has been drawn by the American jurists, when dealing with similar cases; in view of all these considerations I conclude that a well defined distinction must be drawn, when dealing with a charter power such as is enjoyed by the city of Montreal, and an exemption act, such as the one under consideration, between ordinary annual municipal taxation and a local assessment imposed upon a special locality to repay

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the expenditure caused by a local improvement in that locality, that the corporation could order the drain to be constructed and assess its cost, as it has done, upon the respondents (defendants), notwithstanding the provisions of the Act 41 Vict., chap. 6, sect. 26. I think, in the words of Maxwell, "that it is highly improbable that the "legislature, when purporting to amend the acts relating "to public instruction, intended to overthrow fundamen- "tal principles, infringe rights, or depart from the general "system of law, without expressing such intention with "irresistible clearness," that as the City Charter clearly recognizes the principle that those whose property receives special and exceptional benefits from the action of the corporation shall pay for the same in the manner and to the extent contemplated by the City Charter, and that it is not to be supposed that the legislature when dealing with the general taxing power for general municipal benefits, also had in view the improvement of property belonging to private educational establishments at the public expense, and to put the cost of such improvements either upon the corporation as a whole, or upon the properties of those benefited, to the exclusion of such private educational institutions.

Equality of benefits involves the idea of equality of sacrifice. Exemption from this is of strict interpretation, and has been ever so considered by the Courts here, in England and in the United States. I do not feel inclined to enlarge the meaning of the statute one jot beyond what I am by its "irresistible clearness" bound to do, because I cannot think in so doing I am interpreting the true intent and real meaning of the Legislature. If in so doing I err it is easy for the Legislature to declare its meaning in unmistakeable terms, and it will be then my duty to enforce that will should occasion arise; but, in the mean time I may be permitted to repeat what I have before said: that whilst I would be as ready as most men to permit an exemption in return for public benefits conferred by educational or other establishments, I would be amongst the last to admit that the Legislature should, even by im-

plication, favor the idea that the Legislature would delegate the power to improve the property of A, at the expense of B and C, and without their consent first had and obtained in matters of local improvement in a city such as that of Montreal. It would be a step, to my mind, in legislative disregard of the rights of property, it would tend to lead the human mind to think that it may be made legal, if it cannot be made right or just, to take from the property of one man to give it to another, in fact it savors of communism, which God forbid the Legislature or the Bench of this country should ever lend their countenance to.

My attention has been drawn to the Hochelaga case, but (with all proper respect), I do not see any similarity to the case under consideration.

I conclude, therefore, that the Act in question only covers and was only intended to cover exemptions from ordinary annual municipal and scholastic taxation. That it does not cover local assessments for local advantages to special properties over which the Corporation has the control, and which it may originate and distribute under its charter the cost of, on the proprietors specially benefited by it. That the judgment is erroneous and should be set aside. In this opinion the majority of the Court coincides.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that the work done (drain), and for the repayment of the cost of which this action is brought, is a work which it was within the attributes of the appellants to order to be done, and to assess the cost thereof amongst the persons and upon the property to be benefited by it;

"And considering that it appears, moreover, that this drain was of a local character and for a local purpose, and for the benefit of the respondents' property, and that the assessment claimed is not of the nature of a municipal tax within the true intent and meaning of the Act 41 Vict. ch. 6, sect. 26, but is on the contrary of the nature of a lo-

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cal assessment for local purposes, and therefore that in the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal, on the 31st of December, 1885, there is error;

"Doth reverse, set aside and annul the said judgment, and proceeding to render the judgment which the Court below should have rendered, doth adjudge and condemn the said respondents to pay unto the said appellants the sum of $861.90, with interest, etc., and costs of suit, etc., costs in appeal to be taxed as in a cause of the first class.

"The Hon. Mr. Justice Baby dissenting."

Judgment reversed.

Rouer Roy, Q.C., attorney for appellant.

Geoffrion, Dorion, Lafleur & Rinfret, attorneys for respondents.

(J. K.)

November 22, 1887.

Coram DORION, CH., J., TESSIER, CROSS, CHURCH, JJ.

LA COMMUNAUTÉ DES SŒURS DES SAINTS NOMS DE JÉSUS ET MARIE,

(*Opposants in Court below*),

APPELLANTS;

AND

THE CORPORATION OF THE VILLAGE OF WATERLOO,

(*Seizing creditor in Court below*),

RESPONDENT.

Exemptions from taxation, M. C. 712, 978*a*—*Taxes imposed by municipal by-laws for payment of interest and creation of sinking fund for redemption of municipal debentures.*

HELD:—That taxes imposed by municipal by-laws for the payment of the interest and the creation of a sinking fund for the redemption of municipal debentures constitute a hypothec upon all the real pro-

perty of the municipality taxable at the date of the passing of such by-laws, and the hypothec continues to affect the property even when it passes into the hands of a purchaser in whose possession it would have been exempt from taxation had he owned it at the date of the passing of the by-laws.

The appeal was from a judgment of the Superior Court, Bedford (BUCHANAN, J.), 14 June, 1886, in the following terms :—

"The Court, etc.....

"Considering that the assessments sought to be levied by the said creditors were based upon and had their origin in the provisions of the respective by-laws referred to in the pleadings in this cause, and which were in force and were acted on long previous to the acquisition by the opposants of the property now owned by them for the purpose of an educational institution;

"Considering that the valuation rolls as well for the years preceding, as for those succeeding such acquisition by the opposants of the property in question, determined merely the annual amount of the tax to be levied under such by-laws, which taxation was always existent and could only be satisfied by the payment of the debentures issued under such by-laws;

"Considering that there is no express exemption by law in favor of the property of an educational institution as to taxes imposed before the acquisition of such property by such institution;

"Considering that the opposants have failed to maintain the material allegations of their opposition *afin d'annuler*, doth dismiss the same, and doth maintain the conclusions of the contestation thereof by the said creditors, with costs *distraits*, etc."

The case is fully explained in the observations of the learned judge who pronounced the judgment in the Court below.

BUCHANAN, J. :—

This case, involving no controversy as to mere matters of fact, has been submitted with the arguments in excellent

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and ample factums. The subject matter is briefly as follows :—

By a by-law of the village corporation, No. 17, and known as the Market by-law, and passed by the council, and finally approved in due form of law on the 18th Sept. 1871, authorization was given to borrow the sum of $5,000 for the purpose of building a market, by the issue of debentures payable in 15 years, to meet the interest on which and to provide a sinking fund of two per cent additional, there was imposed a special rate and assessment of 2½ mills on the dollar on all the *rateable property* in the municipality, according to the valuation roll then existing, over and above all other rates and assessments, which said rate and assessment should be levied and collected yearly and every year, until said debentures should be fully paid.

Under another by-law of the same corporation, being No. 21, and known as the Railway by-law, and finally approved on the 16th Dec. 1871, authorization was given to the corporation to subscribe for and take shares in a certain railway, to the extent of $30,000, and for the purpose of paying the same, the corporation should issue debentures to the above amount, payable in 20 years, and for the payment of the same, a sinking fund was created of two per cent, to be levied annually upon the "taxable property" of the municipality, and for the purpose of meeting the interest and sinking fund, an assessment for their ultimate redemption was imposed upon the "rateable property" of the municipality, according to the valuation roll then existing, of 10 mills on the $, which said special rate and assessment should be levied and collected yearly and every year, until such debentures should be fully paid.

All the debentures referred to were regularly issued, and the assessments imposed under said by-laws were levied on the rateable property comprised within the municipality, including that belonging to the late Hon. A. B. Foster. On the 1st June, 1882, the opposants, carrying on an educational institution, acquired this property

from the representatives of the late Mr. Foster, and since then have conducted such an institution on the property in question.

Proceedings under the Municipal Code have been taken to levy the amount of the assessments due for the years 1882-3-4, under the Market by-law, and for the years 1883-4 under the Railway by-law, upon this property now owned by the opposants. They resist the attachment by opposition. There is no dispute here as to the legality of the original imposition of these assessments, nor as to the fact that when so originally imposed, nor until the time when the property was acquired by the opposants, it was legally subject to them; but the controversy arises from the fact that they (les Sœurs), being admittedly the conductors of an educational institution, and owning and occupying this property as such, are, by virtue of Art. 712 of the Municipal Code, which declares as not being taxable (with certain exemptions not in issue here), property belonging to an educational institution, free from the payment of the taxes now sought to be exacted. The question involved substantially, being, if I understand the argument of the opposants as presented in their factum, is, whether or not this property, having been acquired by an educational institution, was not, by that fact, purged from a tax which may have been validly imposed in its origin, and further, that the valuation roll, at the time of the collection of the tax, and not that in force at the time of the imposition of the tax, shall be the foundation of the tax, and that only the rateable property which was subject at the time of the making of each valuation roll should be liable, so that property which one year might be subject, might next year be exempt by reason of having become non-rateable property. This latter is the very point at issue, and were the making of each collection roll the imposition *anew* of a tax, and in such a case as the present one, the argument contained in the opposant's factum would be impregnable.

It is unnecessary to refer with particularity here to the enactments contained in chaps. 24 and 25 of the Con.

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Stat. of L. C. regulating the proceedings as to the imposition of taxes such as the present, for the question is substantially involved in the interpretation to be given to article 978*a* of the Municipal Code. By that it is declared that the taxes intended to pay the interest upon municipal debentures issued *before* or *after* the coming into force of this Code, as also those intended for the payment of a sinking fund, or for the redemption of such debentures, shall be imposed *or* levied (in the French in the conjunctive *imposées et prélevées*), according to the last valuation roll in force in the municipality.

Can it be truly and reasonably contended that each new valuation roll and the collection roll based thereon, is a new imposition of taxes, such as are being at present considered? When these by-laws came into force, the rateable property, including that in question, was duly assessed according to its value, for a proportionate amount. When new valuation rolls were made, a new tax was not imposed, *that* was imposed under the by-law, and immediately affected all property. The old tax still existed, and all that *varied* was the amount to be paid, more or less than before, according as the valuation increased or diminished; but the tax itself was always there before the opposants acquired the land, when they acquired it and since they acquired it. The art. 978*a* says, taxes shall be imposed or levied according to the last valuation roll. The imposition of a tax and the levy of a tax, it may be plausibly argued, are two distinct proceedings, and they are rightly here put in the disjunctive; for in strict interpretation, and taking the words of the English version as apparently expressing with more precision the intention of the legislature, the expression before or after the coming into force of this Code, may be considered to refer to the imposition of a wholly new tax, or to the levying, *i. e.*, the collecting of an old one; so that this article in its application to the present case, regulates how the tax imposed is to be levied, that is, as to the amount merely, according to the value from year to year, put on the property by the valuator. If every new valuation meant

merely an imposition of a tax *qua* tax *anew*, there would be force in the argument of the opposants, for they might well say, our property being non-rateable, the tax cannot be imposed upon it. But the Court, looking at the words themselves, of the by-laws imposing a special tax on all the then rateable property, fixing it as such at the time, and being the base and foundation of the tax, adopts a different view, and viewing the tax as having been imposed, and taking its origin in the by-laws, and always existing until the debentures were paid, the rating required by each subsequent valuation roll in no way affected it, except as to amount. The property once being rateable, always *quoad* that tax, remained so, until it was satisfied. No change of ownership involving an exemption from further taxation, could have the effect of extinguishing a right already existing, except by direct legislation to that effect. It is a well known principle of law (2 Dillon, § 776,) "that as the burthen of taxation ought to fall equally "upon all, statutes exempting persons or property are "construed with strictness, and the exemption should be "denied, unless so clearly granted as to be free from "doubt." Our own Courts act on this principle, for in the case of the *Corporation of Verdun* against *Les Sœurs de Notre-Dame*, 1 Q. B. (Dor.), p. 168, one of the learned judges of the Court of Queen's Bench says, "Exemptions are pre-"sumably made in the public interest, and not otherwise, "on the supposition that if the exemptions were not ac-"corded, an equivalent should be restored to the exempted "party, to compensate for the public burdens assumed by "such a party, and it is of common interest that this prin-"ciple should be recognized. As a necessary consequence, "it is incumbent on the party claiming exemption to show "*clearly* that the claim of such properly falls within the "terms of the exemption. To admit that the law is "*doubtful*, or may be susceptible of a construction in the "sense of the property being taxable, is to abandon alto-"gether the right to exemption." All that the law here says is, that certain property is not taxable, and if the creditor's premises are correct, that the property was then

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taxed, it would be giving the law an interpretation larger than it would bear on its face, to say that it released this property from existing taxation ; at any rate, such an interpretation would be fairly doubtful, and the doctrines above enumerated may be applied to the case. This tax is a privilege recognized by law, and affects the property although passing into other hands. Somewhat analogous are the assessments for the building of churches affecting the lands of Roman Catholics, but the transmission of these lands to Protestants does not free them from the assessments.

Further, the subtraction of the property from the tax in question might be a violation of the obligation of contracts, not to be sanctioned except by the supreme authority. Not only would the other rate-payers be injuriously affected thereby, but also the holders of the debentures who had a privilege on this property when acquired by the opposants, and to say that by its present destination it has became non-rateable, would be in effect to deprive third persons of acquired rights. The principle advocated, if good for anything logically, must be good to its fullest extent, and the supposition that since the issue of the debentures all the rateable property in the corporation was acquired by an educational institution, and thereby all became exempt, reduces the proposition, if not to an absurdity, at any rate, to one involving the absolute destruction of all justice. The opposition will be dismissed with costs.

Sept. 22, 1887.]

Lacoste, Q. C., for the appellants :—

L'intimée rencontre l'opposition de l'appelante en disant que la taxe imposée en vertu de deux règlements, constitue un privilège sur l'immeuble que l'exemption que la loi accorde à l'appelante ne peut affecter aussi longtemps que les débentures émises en vertu des dits règlements, n'auront pas été complètement rachetées.

Toute la question dans cette cause est de savoir si l'appelante est, par l'article 712 du Code Municipal moins

exempte des taxes imposées sur leur propriété que de toutes autres.

Tous les faits de la cause ont été admis de part et d'autre.

L'intimée a admis notamment : que l'appelante est une institution religieuse d'éducation et que la propriété en question est un bien non imposable, si ce n'est pour les taxes non réclamées en vertu des règlements précités, que les taxes imposées en vertu des dits règlements ont été prélevées depuis leur imposition d'après le rôle d'évaluation en force chaque année.

L'intimée appuie son prétendu privilège sur le fait que les règlements précités décrètent que la taxe sera prélevée d'après le rôle d'évaluation alors en force, c'est-à-dire à la date où chacun des dits règlements ont été promulgués.

Les règlements No. 17 et No. 21 ont été faits et la taxe a été imposée en vertu des chapitres 24-25 des Statuts Refondus du Bas-Canada qui constituaient la loi alors en force.

La sous-section 10 de la section 24 (Acte des Municipalités et Chemins) donne pouvoir à toute corporation municipale d'emprunter les fonds nécessaires pour aucune des fins du ressort du conseil municipal ou pour aider à la construction de tout chemin de fer en vertu de l'Acte des chemins de fer (chapitre 25 Statuts Refondus).

La sous-section 11 exige que la souscription n'excède pas vingt pour cent sur l'évaluation totale des propriétés affectées par tel règlement, suivant le rôle d'évaluation alors existant, et qu'il soit imposé par ce règlement une taxe annuelle suffisante suivant ces rôles d'évaluation, pour payer l'intérêt et le fonds d'amortissement.

La sous-section 2 de la section 1, chapitre 25, intitulé : " Acte concernant les municipalités qui prennent des ac- " tions de chemins de fer et autres entreprises," donne au conseil le pouvoir d'imposer pour le paiement des intérêts et des fonds d'amortissement, une taxe sur toutes les propriétés cotisables de la municipalité.

La section 3 du même acte défend au conseil de souscrire et de passer un règlement à cet effet s'il n'a pas été

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fait dans les cinq années précédentes, une évaluation des propriétés immobilières imposables et il est dit: "telle "évaluation servira de base au prélèvement de toute taxe "ou cotisation dans la municipalité en vertu de tout règle- "ment passé sous l'autorité du présent acte."

La section dit: "La taxe et cotisation spéciale imposée "par tout règlement qui sera passé comme susdit, sera "levée, prélevée et perçue annuellement de la même ma- "nière que les autres taxes et cotisations."

La sous-section 2 de la même section 6 dit que "la dite "taxe et cotisation spéciale sera levée, prélevée et perçue "sur toutes les propriétés imposables de la municipalité."

Quel rôle d'évaluation doit servir de base au prélèvement de la taxe? Est-ce celui qui était en force lors du règlement, ou si c'est celui qui était en force lors du prélèvement de la taxe?

Nous soumettons que c'est le rôle d'évaluation en force lors du prélèvement de la taxe. Cela paraît être la seule interprétation logique.

Le rôle d'évaluation en force lors du règlement sert de base pour fixer le montant de la souscription et la proportion de la taxe annuelle, mais la répartition doit s'en faire d'après le rôle en force lors de son prélèvement, c'est-à-dire qu'il n'y a que les propriétés imposables d'après les rôles annuels qui sont taxées, et le montant de contribution de chacune de ces propriétés est déterminé par le rôle en force, à cette époque.

Les termes précités de la section 6, chapitre 25, sont suffisants pour justifier l'interprétation que nous donnons.

Le sens commun nous conduit en outre à donner la même interprétation. Par exemple, une propriété serait portée au rôle d'évaluation à dix mille piastres, le terrain en valant mille et les bâtisses neuf mille. Si dans le cours de l'année, les bâtisses étaient détruites par un incendie, cette propriété ne vaudrait plus que mille piastres au lieu de dix mille. Or, peut-on prétendre que pendant cinq, dix, quinze ou vingt ans, cette propriété devrait être imposée à raison de dix mille piastres?

La question d'ailleurs est réglée par l'article 978 du

Code Municipal, tel qu'amendé par la 36 Vict. (Q.), chap. 21, ec. 3, et par la 41 Vict. (Q.), chap. 10, sec. 30. Il est dit que " toute taxe destinée à payer l'intérêt des bons " municipaux émis *avant ou après* la mise en force du Code, " comme celles destinées au paiement du fonds d'amortis- " ment ou rachat de ces bons, doivent être imposées et " prélevées d'après le dernier rôle en force dans la muni- " cipalité."

Dans notre opinion il n'y a que les propriétés imposables d'après le rôle en force de l'année qui doivent contribuer au paiement de ces taxes.

Telle propriété qui, l'année précédente, a contribué, peut, l'année suivante, être exempte parce qu'elle est devenue dans l'intervalle propriété non-imposable et *vice versa*. C'est ce qui a eu lieu relativement au terrain de la communauté acquise de Madame Foster.

Maintenant la propriété de l'appelante est-elle sujette à cette taxe spéciale ou n'y a-t-il que les taxes ordinaires dont elle est exempte ?

Il est admis, avons-nous dit, que la propriété de l'opposante est un bien non imposable.

L'exemption, dans notre opinion, couvre toutes les taxes municipales de quelque nature qu'elles soient. C'est ce qui s'infère des expressions de l'article 712, sont des biens non imposables ; or la taxe n'est prélevée que sur les biens imposables, c'est ce qui résulte de la définition du terme : " taxe municipale " qui comprend toutes taxes et contributions en deniers imposées " par les conseils municipaux " ou en vertu de procès-verbaux ou d'actes de répartition."

L'article 713 du Code Municipal qui énumère les exceptions à la règle posées dans l'article 712, nous fournit un argument aussi fort que le précédent. Puisque le législateur a pris le soin d'énumérer les charges auxquelles seraient, par exception, assujetties les propriétés non-imposables et qu'il n'a pas mentionné les taxes spéciales et notamment celles des chemins de fer, il faut en conclure qu'il n'a pas voulu que ces propriétés fussent chargées des taxes de cette nature.

Nous soumettons donc humblement que l'appelante

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n'est pas tenue au paiement des taxes réclamées par l'intimée, que la propriété en question n'est pas assujettie au paiement de ces taxes et qu'il y a erreur dans le jugement de la Cour Inférieure.

O'Halloran, *Q.C.*, and *Noyes*, *Q.C.*, for the respondents :—

There is merely one question involved in this case, and that is one of law ; whether taxes imposed by municipal by-laws for the payment of the interest and the creation of a sinking fund for the redemption of municipal debentures, create a veritable hypothec upon all the real property of the municipality taxable at the date of the passing of such by-laws, so as to adhere to such real property into whosesoever hands it may pass ? or whether real property taxable and properly taxed and hypothecarily bound at the date of the passing of such by-laws, becomes purged of such taxation and such hypothec when it passes into the hands of one in whose possession it would have been exempt from taxation had he owned it at the date of the passing of such by-laws ?

The pretensions of appellants are embodied in these two allegations of their opposition, viz :—

" Que par la loi, la corporation du village de Waterloo n'a le droit d'imposer les taxes que sur les biens imposables de la municipalité du village de Waterloo.

" Que par la loi, la propriété possédée et occupée par l'opposante à titre de propriétaire est déclarée bien non-imposable, et que partant l'opposante est exempte des taxes imposées sur telle propriété et réclamées d'elle en cette cause."

In other words, that the property which was taxable and taxed while owned by Col. Foster, became exempt from taxation, and purged of the taxes imposed by the said by-laws, by the mere mutation of the property from the widow of Col. Foster to appellants in 1882. That is the sole issue.

Since the passing of the by-laws in question, a change has been made in the law as to the mode of apportioning the taxes imposed by the by-laws, which, although perhaps not very material to the issue in this case, since the

rights acquired by the holders of the debentures can hardly be affected by subsequent legislation, it may be well to note.

The law under which the by-laws were passed imposed two essential conditions. Chap. 24, sec. 24, sub. sec. 11 of Con. Stat. L. C. provides that by-laws should be ineffectual unless for a sum less than 20 per cent of the value of affected property, "*according to the valuation roll then existing*," and unless such by-laws imposed a yearly rate sufficient "*according to the valuation roll then existing*," to pay the interest and two per cent additional to create a sinking fund. And sub. sec. 1 of sec. 2 of chap. 25, Con. Stat. L. C., declares no by-laws shall be passed until all the provisions and requirements of among others, Sub. Secs. 10 and 11 of Sec. 24 of chap. 24, Con. Stat. L. C. have been complied with. Sub. Sec. 1 of Sec. 6 of said chap. 25 provides for the annual collection of taxes imposed by such by-laws, and that for such taxes there shall be the *same hypothec*, mortgage and priority to secure collection, as for other taxes, and Sub. Sec. 2 provides for their collection from all rateable property.

Such was the law under which the by-laws in question were passed, and so continued until amended by 36 Vict., chap. 21, sec. 31, and again by 39 Vict., chap. 29, sec. 8, and finally by 41 Vict., chap. 10, sec. 35, which has given our present 978*a* of the Municipal Code, enacting that taxes like those in question, "shall be imposed or levied "according to the last valuation roll in force in the mu- "nicipality," and requiring the secretary-treasurer to make a special collection roll, apportioning on "the taxable properties *subject thereto* according to their respective values, as shown on such valuation roll, the amount of tax imposed for the interest and annual payment to sinking fund."

The amendment 978*a* does not withdraw any property from taxation, or from liability to taxation under by-laws like those in question, but provides a more fair and equitable method of apportionment and collection, so that those benefited by the expenditure for public improvements might contribute; that the confusion incident to

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changes of owners, sub-divisions of property, etc., assessed in original valuation rolls might be obviated and the difficulties aggravated each succeeding year by such changes in owners and in values, by divisions and sub-divisions of property, might be subject to some settled rule and not left to the discretion of the secretary-treasurer. But what is the new rule of apportionment under 978*a* of M. C.? Simply that the secretary-treasurer shall apportion the taxes on the properties *subject thereto*. What properties are subject thereto? Evidently those upon which the tax was imposed, the rateable property made liable by the by-laws. What rateable properties were made liable under those by-laws for the taxes in question? Certainly those in existence and not exempt when the by-laws were passed, according to the then existing valuation rolls. It was the intention as it was the law to make the property liable for such taxes, being real and not personal taxes. The amendment did nothing more than simplify the method of collecting the original tax imposed by by-laws upon the original properties made liable therefor. It is a mere matter of procedure. The legislature made no new basis, did not withdraw any taxable property from liability, nor could it have done so. The liability had been created by law and the law could not be changed by subsequent legislation to evade or destroy that liability. It could not give such amendment a retroactive effect so as to imperil interests already created, those of the bondholders and ratepayers. Nor has it done so by making a more just procedure for collection. Under those by-laws the taxes are imposed in every essential particular. The amount of debt, the term of payment, the property to pay said debt within the fixed term were given in each case. Art. 978*a* of the Municipal Code then comes in, wherein it changes nothing affecting those by-laws, but gives instructions as to apportionment of the tax on the taxable properties *subject thereto*, that is subject or liable thereto according to the terms and basis of the by-laws and the law and valuation rolls in force when the by-laws were passed. The taxes were to be apportioned and levied

under that new rule of procedure for collection. It was an apportionment of an existing rate to pay an existing debt, upon the properties liable for such debt, and in no sense the imposition and apportionment of a new tax.

But the making of that amendment is conclusive evidence, at least, as to the law when those by-laws were passed. If the law had not been, prior to that amendment, to the effect that the tax should be collected according to the terms of the by-laws, that is, according to valuation rolls existing when passed, then why was the amendment made? So that, as to the question of liability we have always to return to the law existing when the by-laws were passed, to ascertain if the by-laws conformed thereto, unless it be determined that, in an amendment simplifying the process of collection, the legislature intended to destroy vested rights by retroactive legislation and had the right so to do. When those by-laws were passed and came into force, the law was, as already stated, that all real estate not then exempt from taxation became properties *subject thereto*, or liable for the tax, became subject to privilege and to the hypothec, mortgage and priority to secure recovery of the annual rate provided by sec. 6, chap. 25, Con. Stat. L. C. and by sub-sec. 10 and 11 of sec. 24 of chap. 24, Con. Stat. L. C., as well as other statutes mentioned, and the by-laws were to contain provisions to give effect to the law.

The law before cited, as well chap. 25 as chap. 24, compelled the yearly rate to be imposed on property according to then existing valuation roll. The rule was, the property on such valuation roll shall be subject to privilege, hypothec, mortgage and priority for amount of loan, in proportion to its value stated thereon, and such rate shall establish the proportion of annual payment to liquidate loan. The electors voted and became bound under that condition, and the debentures were issued and sold under that condition. The Civil Code, art. 2009, sec. 5, provided then as now that all rates and assessments should be privileged. The Mun. Code accords therewith. In *Beaudry* v. *Hart et Syndics d'Ecole de Trois-Rivières*, 11 Q.

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L. R., p. 257, Judge Casault said, "*Quant au privilége que les arts.* 2009 *et* 2011 *du Code Civil y attachent, il n'est limité à aucun espace de temps et il doit durer autant que la dette même.*" That privilege must exist until fulfilment of conditions of by-laws, until the debentures or debt are paid, and legislation to destroy it would, in its effects, amount to confiscation, and in its operation be retroactive and illegal. Mun. Code, art. 946.

These by-laws in effect said, every part and parcel of land in said village then on the valuation rolls existing and in force at dates of enactment of said by-laws respectively, shall be subject to such privilege, mortgage and priority to pay debentures, but instead of paying $5,000 cash down in one case and $30,000 in the other case, for the objects of the by-laws, the occupants and owners of such real estate, taxable property, then on said valuation roll, that is such taxable property, shall be accorded the privilege of paying their proportion on said basis by partial payments, annual payments, of, in the one case 2½ mills on the $ and in the other 10 mills on the $, instead of paying a lump sum at once. It was merely an extension of time granted the debtors with payments by instalments, and under the approbation of the law. It is not reasonable to presume that the legislature intended that its enactments, enabling the rate-payers of a municipality to incur a debt which could be paid by instalments within a certain delay, should be made the means of enabling the properties liable to that debt to gradually slip out of such liability, and shift their share of the burden upon the shoulders of others.

If the municipality had paid these subscriptions or made these expenditures at one time in a lump sum, and then assessed the property in question, in one rate, for its share or proportion of the whole subscriptions or expenditures, according to valuation roll then existing, it could not for a moment be pretended that the then owner, Hon. A. B. Foster, could have avoided payment, or that the privilege would be released, except by payment or prescription. But prescription cannot be invoked against taxes

imposed by such by-laws, Mun. Code, 950. The rate was on the property. The council and the rate-payers instead of demanding payment, distributed such payment over a number of years, in one case 15 annual payments or contributions, and in the other 20, and the law authorized such a course and provided for hypothec and priority on the property to secure the recovery of such annual payments.

A subsequent purchaser acquires no greater rights or privileges than his *auteur* had, *quoad* anterior rights and liabilities arising therefrom. Such purchaser could not be relieved from the payment of those annual privileged payments, or contributions unless the right existed when the property was acquired and then directly affected the property in question, nor could such purchaser be relieved by a subsequent law. It was a condition precedent of the by-laws and of the action of the electors, that the property in question, if then on valuation rolls, should be liable unless then exempt, and it is safe to say that had it then been exempt, the by-laws would never have been sanctioned by the municipal electors, representing as the property in question then did, so large a proportion of the whole taxable property of the village. Nor is it clear that the property in question would then have been exempt if owned by opposants, as the law stood when the by-laws were passed.

Registration is not necessary to secure the privilege and hypothec for such taxes as a general rule, but to protect holders of debentures and show with certainty the property liable for the payment of the debentures or debt under such hypothec and priority according to terms of by-laws creating debt and authorizing issue of debentures, an Act was passed, now chap. 84 of Con. Stat. of Canada, perpetuated in our municipal laws by art. 991, Mun. Code. The preamble of chap. 84 says, "whereas "it would tend, etc., to the better security of the holders "of the same (debentures) that a system of registration "should be adopted and a priority of lien in respect "thereof given, etc." Sec. 1 provides for the by-laws

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passed before 1859, and sec. 2 for the transmission of those passed after 1859 by the secretary-treasurer to the registrar, together with a return according to form given, showing among other things the assessed value of real and personal estate belonging to the municipality and the yearly rate to liquidate debentures. Articles 990 and 991, M. C. are practically the same as chap. 84 before mentioned.

Those enactments go further than the mere act of establishing that priority of registration should protect. They, in effect, say that as the by-laws and returns must be registered, *before the sale or contract for sale* of such debentures, the taxable property of the municipality mentioned in that return in connection with debentures mentioned therein, is and must be the guarantee of the holder of debentures, must be the property on which the priority of the lien exists. The property in question in this cause was on the valuation roll when the by-laws were passed, as taxable property, was included in the return made by secretary-treasurer to registrar, and in consequence became subject to priority of lien, became liable for the yearly rate on the assessed value of the property thereunder. Apart from the provision as to registration, that act esblished no new rate, the priority of lien on property for yearly rate being in existence before. To protect the debenture holders, there could be no safer rule than to make all the taxable or rateable property in the municipality at time of issue of debentures, liable to pay its quota or yearly rate or annual payment for the redemption, in accordance with the terms of their issue, viz, the conditions of the by-laws, and that is the rule prescribed by law. Any other position would endanger the holders of debentures and be disastrous to rate-payers. A case might occur where property after property would become exempt under art. 712 until the yearly rate imposed would not pay the interest nor create the sinking fund required. The burden would prove too much for the rate-payers.

The question of exemption and liability might come up again in the case of division of a municipality when arts. 81 and 82 M. C. would apply, which speak of debts

and obligations and property liable therefor. The amendment to art. 82, passed 48 Vict., chap. 28, sec. 5, shows that the legislature contemplated that the taxable property bound for the debts and obligations of the municipality should still be bound, in each portion of the municipality so divided.

The rule laid down in the by-laws is simple and clear and is the law. That rule in the one case (No. 17) was, "a special rate and assessment of 2½ mills on the $ is "hereby imposed on all the rateable property in said mu- "nicipality, according to the valuation roll now existing," and in the other case (No. 21) was, "there shall be and "there is hereby imposed upon the rateable property in "said municipality according to the valuation roll thereof "now existing, a rate of ten mills on the $." Sub.-sec. 11 of said sec. 24, Con. Stat. L. C., says that the by-law would have no effect or force unless it imposed a yearly rate sufficient according to the valuation roll then existing to pay interest on debentures and create a sinking fund for their redemption. Sec. 2 of chap. 25, Con. Stat. No. 5, provides that no by-law can be passed without the fulfilment of requirements of that sub.-sec. 11 of sec. 24 and sec. 6 of chap. 25 aforesaid, and says further that such yearly rate shall be subject to hypothec, mortgage and priority of lien.

The Municipal Code, and all the laws and acts anterior thereto, dealing with this question, speak of and deal with the "yearly rate" due on the property made liable for the debt created by the by-laws, and nowhere is it provided that the property so made liable for such "yearly rate," instalment or tax in and by such by-laws, shall be exempted or withdrawn from such liability. On the contrary, it appears from the consideration of the law as a whole, that the law intended, as it would be contrary to common sense to suppose otherwise, that when a debt was created by such by-laws, a privilege or hypothec was at once created on all the taxable property in the municipality not then exempt, and which would subsist until the debt should be fully extinguished by payment.

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The taxes from which opposants are exempted by 712 M. C. are those enumerated in that Code. Ordinarily it is the tax mentioned in art. 489, M. C., imposed like most taxes yearly, under a by-law made each year, in which is embodied the special purpose for which the tax is imposed, the amount imposed, the property liable for the tax, the owner or occupant of the property, and yearly rate, the date when payable, and thereupon a general collection roll is made for its collection. Such by-law was and is intended to cover the ordinary municipal expenditure, and the rate is high or low in proportion to the wants of the municipality. From such a tax opposants are exempt.

But on exceptional taxes like the present, where the protection of holders of debentures has to be considered as well as the rights and liabilities of tax-payers, there could not from the very nature of things, be an annual by-law, nor does the law require but the one by-law, and therein it is enacted, as it is regulated and enacted in the by-laws in question, as firmly as possible, the purpose of the tax, the amount to be raised, the property liable for the tax and the yearly rate to pay said amount or sum. No new by-law is required each year, because no new tax is imposed each year. All the secretary-treasurer had to do before art. 798*a* was added to the Municipal Code was to collect each year from a collection roll made when the by-laws were passed, the yearly tax on the property mentioned in the valuation roll forming part of the by-law, according to the rate therein specified. Since the enactment of 798*a* the secretary-treasurer has to make each year a special collection roll, following the fluctuations of successive valuation rolls, as to the *value only* of property subject to the tax by the by-law, and not as to the particular property on the new valuation roll or the new owner thereof, apportioning and levying not a new tax, not a fresh annual tax, but an old tax, an old rate, on the same property liable originally for the tax under such annual apportionment, with the possible incident of finding that property in the hands of one or more new proprietors with new values. But the property itself stands

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as it did when the by-law was passed, liable for the tax. As all taxes are due by owners and occupants, and opposants are owners of a property liable under by-laws, it was and is the duty of the secretary-treasurer to apportion the taxes in question against the property held by them so liable, annually. In this matter the corporation did not impose a new tax for the years in question, as the opposants assume, but was merely seeking collection of one already due and exigible when they acquired the property. The council itself has not the right to pass a by-law in any way affecting the taxes in question or their collection, but it is made the imperative duty of the secretary-treasurer to collect such taxes on the basis and under the terms approved by the electors, confirmed by the lieutenant-governor and simplified by recent enactments as to apportionment for collection and in no other way.

But apart from other considerations, if articles 712 and 798*a*, M. C., had not been enacted, could opposants have claimed exemption, seeing that the by-laws were passed before said Code came into force? It is submitted they could not for reasons already given.

If the property in question, when purchased by opposants, had been subjected to a conventional hypothec, created by its previous owner, the opposants or property would have been obliged to pay that hypothec. Here there was a hypothec endowed with a privilege so special, when opposants purchased the property, that it ranked in privilege before a conventional hypothec, and it is difficult to see how a later enactment can destroy that mortgage, and exempt the property from its payment, or that the procedure for the collection of a claim can establish a principle destructive of that claim.

CHURCH, J. (after stating facts) :—

The real question is whether the mutation of the property, into the hands of persons exempt from taxation, had the effect of exempting this property from taxes imposed for the payment of interest. The general principle

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is that all property is taxable; those who claim exemption must show it affirmatively. The statute invoked by the appellants must be considered to be retroactive in order to exempt them, and statutes are not ordinarily to be taken as retroactive. The question has been very fully treated by the learned judge who pronounced the judgment in the Court below, and in his reasoning I fully concur. It is unnecessary, therefore, to enter into the case at any length, which would merely be repeating what has already been said. The conclusion of the Court is that the tax being imposed at the time the by-law was passed, and creating a hypothec on the taxable property in the municipality, and the Municipal Code not having declared that any exemption exists, the tax is a charge upon the property, and inseparable from it in whosesoever hands it may be. We think, therefore, that the judgment of the Court below was correct, and it is confirmed.

Judgment confirmed.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for appellants.

Noyes & Bernard, and *O'Halloran & Duffy*, attorneys for respondents.

(J. K.)

25 février 1888.

Coram DORION, J. C., TESSIER, CROSS et CHURCH, JJ.

PETER DONOVAN,
(*Demandeur en Cour Inférieure*),
APPELANT;

ET

THE "HERALD" COMPANY (LIMITED),
(*Défenderesse en Cour Inférieure*),
INTIMÉE.

Publication des procédés publics d'une assemblée délibérante—Responsabilité—Appel.

JUGÉ:—1o. Que la publication des procédés publics d'une assemblée délibérante n'entraîne aucune responsabilité lorsque cette publication est faite de bonne foi et sans malice, de faits qui ont rapport à l'objet de l'assemblée et qui sont d'un intérêt public;

2o. Qu'une Cour d'Appel ne doit pas infirmer un jugement sur une demande en dommages pour diffamation, lorsqu'il ne s'agit que d'une simple appréciation de la preuve et que l'appelant n'aurait tout au plus droit qu'à des dommages nominaux.

Voici le jugement *a quo*, rendu à Montréal (JETTÉ, J.) le 30 décembre 1886:—

"La Cour, etc.....

"Attendu que Donovan, l'un des échevins de la cité de Montréal se pourvoit en dommages contre la compagnie propriétaire du journal appelé "The Montreal Daily Herald," lui reprochant d'avoir, le 5 décembre 1885, dans un prétendu rapport des procédés d'une assemblée du conseil de ville, attribué faussement et malicieusement à l'échevin McShane des paroles ou un discours contenant des injures à l'adresse du demandeur et alléguant spécialement que McShane n'avait pas prononcé tel discours, et que ce rapport faux et mensonger avait été malicieusement et volontairement fabriqué et publié par la compagnie défenderesse dans l'intention de faire tort au demandeur;

"Attendu que la défenderesse conteste cette action, disant:

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"Que le compte-rendu publié est un résumé fidèle, vrai et loyal de ce qui s'est passé au conseil, que les paroles rapportées sont celles dites par McShane, et qu'elles ont été publiées sans malice et dans l'intérêt public, les procédés du conseil intéressant le public en général ; que le lendemain de cette publication le demandeur s'étant plaint de ce compte-rendu et ayant requis la défenderesse de reproduire celui publié par un autre journal appelé "The Gazette" afin de réparer le tort qu'il soutenait lui résulter de celui du "Herald," la défenderesse s'est empressée de se rendre à cette demande et d'accueillir en outre diverses communications favorables au demandeur et écrites sur le même sujet ; enfin que le compte-rendu reproché a été publié sans aucune intention de faire tort au demandeur et avec la plus entière bonne foi quant à sa vérité et à son exactitude, et que le demandeur n'en a pas souffert ;

"Attendu qu'il résulte de la preuve que le discours, dont la publication est reprochée à la défenderesse, a été prononcé au milieu du bruit et du tumulte soulevés par l'altercation survenue entre l'échevin McShane et le demandeur et qu'il était fort difficile d'en saisir tous les mots et de s'en rappeler toutes les expressions, que d'un côté les témoins de la demande, tout en affirmant que le compte-rendu du *Herald* est exagéré, sont forcés d'admettre qu'ils peuvent avoir oublié quelque chose ; que le rapporteur de la *Gazette* lui-même déclare que pour écrire son résumé il a été obligé de se renseigner, après la séance, auprès de diverses personnes, que d'un autre côté les témoins de la défense affirment que toutes les paroles attribuées à McShane par le compte-rendu du *Herald* ont été prononcées et que ce rapport est plus complet que celui de la *Gazette ;* qu'enfin le témoin McShane lui-même affirme avoir dit tout ce qui est rapporté, et même avoir été plus loin et avoir accentué d'avantage ses paroles, ce qui est confirmé par le témoin Malone ;

"Attendu qu'en prenant l'ensemble de la preuve faite, il parait ressortir des diverses versions données par les témoins que le compte-rendu reproché ne pècherait pas d'une manière appréciable par l'inexactitude des paroles

attribuées à McShane, mais simplement par l'absence des interruptions que ce dernier a subi ;

"Attendu que bien qu'il soit de plus prouvé qu'après la séance du conseil l'échevin McShane a fourni lui-même par écrit au rapporteur du *Herald* la partie reprochée de son discours, la présomption de malice qui aurait pu résulter de ce fait se trouve détruite par la preuve de l'exactitude des paroles rapportées et l'affirmation du rapporteur Marcil qu'il n'a accepté cette rédaction de McShane que parce qu'elle rendait exactement ce qu'il avait lui-même entendu, et qu'enfin la conduite des directeurs et représentants de la compagnie défenderesse, dans les rapports qu'ils ont eu ensuite avec le demandeur au sujet des plaintes et réclamations de ce dernier, établit leur bonne foi et l'absence de tout motif malicieux de leur part ;

"Considérant que dans ces circonstances la demande, qui repose uniquement sur la publication d'un compte-rendu faux et exagéré malicieusement, ne se trouve pas soutenue par une preuve suffisante pour justifier une condamnation ;

"Maintient les exceptions et défenses de la défenderesse et renvoie et déboute l'action du demandeur avec dépens distraits, etc."

25, 26 janvier 1888.]

W. H. Kerr, *Q. C.*, pour l'appelant.

W. W. Robertson, *Q. C.*, pour l'intimé.

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DORION, J. C. :—

L'appelant et McShane, tous deux échevins de Montréal, étaient tous deux présents à une assemblée du conseil-de-ville, où l'on discutait l'adoption ou le rejet d'une requête. Donovan, l'appelant, s'y opposait tandis que McShane favorisait la requête. Pendant le cours de la discussion, Donovan et McShane se sont dit des injures très-graves. Ces procédés ont été publiés dans le journal appelé "*The Montreal Daily Herald.*"

D'après l'ensemble du témoignage, la publication dans le *Herald* contient à peu près la substance de ce qui s'est

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passé à l'assemblée. Le lendemain Donovan est allé au bureau du journal, et là s'est plaint à M. Mitchell, président de la compagnie intimée, qui demanda en quoi le rapport était faux, et Donovan répondit que la *Gazette* avait publié un rapport vrai. Sur ce Mitchell promit de reproduire dans son journal le rapport qui avait paru dans la *Gazette*, ce dont l'appelant parut d'abord satisfait; mais revenant sur ses pas, il dit à M. Mitchell que cela ne l'empêcherait de poursuivre le *Herald*. Le lendemain le *Herald* publia la version donnée par la *Gazette* avec une note expliquant que c'était pour rendre justice à l'appelant qui s'était plaint du rapport publié dans un numéro précédent. Il est évident qu'il n'y a pas eu malice de la part de l'intimée. Le rapport dont se plaint l'appelant fut donné ou corrigé par McShane, et il n'y a pas grande différence entre le rapport publié par la *Gazette*, approuvé par Donovan, et celui du *Herald*. Maintenant, il n'est pas prouvé que Donovan a souffert des dommages, et, s'il fallait renverser le jugement, il ne pourrait avoir droit qu'à des dommages nominaux; et dans la pratique une Cour d'Appel n'infirme pas un jugement parce que le tribunal de première instance a refusé d'accorder des dommages à une partie qui n'a souffert aucun grief réel et appréciable.

Il y a une impression trop générale qu'il est permis à la presse de publier dans les journaux tout ce qui se passe à des assemblées publiques. Cette impression est mal fondée.

Un journal n'a pas plus le droit de publier une injure proférée dans une assemblée publique, surtout lorsque cette injure n'a aucun rapport à l'objet des délibérations et n'est d'aucun intérêt pour le public, qu'un particulier n'aurait droit de le faire, et si nous sommes disposés à confirmer le jugement rendu en première instance, ce n'est que parce que la publication a été faite sans malice, que l'intimée a fait ce qu'elle a pu pour satisfaire l'appelant en publiant de suite un rapport qu'il approuvait, et surtout parce que l'appelant n'a pas prouvé qu'il ait souffert des dommages par suite de la publication dont il se plaint,—

s'il en eut été autrement nous aurions condamné l'intimée.

Jugement confirmé.

Kerr, Carter & Goldstein, pour l'appelant.

Robertson, Fleet & Falconer, pour l'intimée.

(H. J. K.)

April 7, 1888.

Coram DORION, CH. J., TESSIER, CROSS, CHURCH, JJ.

JOSEPH O. DESROSIERS,

(*Claimant collocated in Court below*)

APPELLANT;

AND

RICHARD LAMB,

(*Claimant contesting report of distribution*)

RESPONDENT.

Subrogation—Erroneous noting of deed by Registrar—Conflict between written and printed clauses.

HELD:—1. That where subrogation is given by the terms of a deed, the erroneous noting of the deed by the Registrar as a discharge, and the granting by him of erroneous certificates, cannot prejudice the party subrogated.

2. That where two clauses in a deed conflict,—the one written and the other printed, the written clause should have effect, as more likely to contain the real intention of the parties.

The appeal was from the following judgment of the Superior Court, Montreal, (OUIMET, J.), December 9, 1886, maintaining the contestation of the respondent, and ordering the report of distribution to be reformed:—

"The Court having heard the contestant, and the claimant collocated DesRosiers, by their counsel upon the merits of the contestation by said Lamb, of the report of distribution in the present cause, etc.....

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"Considering that the said Richard Lamb, the party contesting the report of distribution in this cause, doth hereby contest the 10th, 12th and 13th items of said report of distribution;

"Considering that the sum of $2,312.15, mentioned in said 10th item and collocated in and by the said report of distribution, in favour of Joseph O. Desrosiers, only ranks after the claim of the said contestant Richard Lamb, filed in this cause for $6,130.23;

"Considering that in and by the said report of distribution, the said Richard Lamb, by said item No. 13, (but which said item should, apparently, following the order of sequence—bear the number 12) is wrongfully collocated for the sum of $4,657.89, instead of the sum of $6,130.89, the amount he is entitled to, being the sum due to the said Richard Lamb, under and by virtue of a deed of obligation and mortgage made and executed by the said defendant Charland, in favor of the said Richard Lamb, before Cushing, Notary Public, at Montreal, on the 15th of March, 1884, for the sum of $5,600, with interest thereon at the rate of six per cent. per annum, from the 15th of September, 1884, up to the date of sale in this cause, to wit, the 13th of April, 1886, amounting to $530.23, (the rate of six per cent. per annum,) being the rate stipulated in the deed from Boyer to Picard of 22nd November, 1881, hereinafter mentioned;

"Considering that in and by the said deed of obligation and mortgage, it is expressly declared that the said sum of $5,600, had been paid to Dame Marie Louise Aurélie Boyer, of the said city of Montreal, widow of the late Auguste Amos, deceased, in his life-time of the same place, and the Honorable Joseph Rosaire Thibaudeau, of the parish of Longue Pointe, senator, in his quality of curator to the substitution created in favor of the said Dame Marie Louise Aurélie Boyer, in extinction of the balance of the *bailleur de fonds* claim, to that amount, stipulated payable under a certain deed of sale from the said Dame Marie Louise Aurélie Boyer to Charles T. Picard, bearing date and executed before Mtre. F. J. Garand, Notary Pub-

lic, on the 22nd of November, 1881, registered in the registry office for Montreal East, on the 10th of December, 1881, and assumed payable by the said defendant Charland under a certain deed of sale from the said Charles T. Picard, to said Charland, bearing date and executed before J. C. Dansereau, Notary, on the 5th of January, 1882, registered on the 12th of the same month and year;

"Considering that the said foregoing declaration was in and by the said deed of obligation and mortgage, stated to be made and was therein made in order that the said Richard Lamb, might be, and he thereby was subrogated in and to all the rights, claims, mortgages and privileges of the said Dame Marie Louise Aurélie Boyer, individually, and the said Hon. Joseph R. Thibaudeau, *es qualité*, as aforesaid, arising out of the said *bailleur de fonds* claim, and in and upon the property mentioned in said deeds of sale hereinbefore mentioned, which property is known as subdivision lots numbers one, two, three and four, of lot official No. 1155, on the official plan and in the book of reference for St. James Ward, Montreal, and is the property seized and sold in this cause, and that mentioned in the said deed of mortgage, of the 15th of March, 1884;

"Considering that the said deed of mortgage last mentioned was duly registered, according to law, in the Registration Division for Montreal East, on the 22nd of March, 1884;

"Considering that on the 19th of March, 1884, in and by a deed of release and discharge made and executed at Montreal, before Cushing, Notary, duly registered in the Registration Division for Montreal East, on the 3rd of April, 1884, the said Dame Marie Louise Aurélie Boyer, and the said Hon. Joseph R. Thibaudeau, in his said quality, as aforesaid, acknowledged and confessed to have had and received before the execution of the said deed of release and discharge from the said defendant and by the hands of the said Richard Lamb, the sum of $5,600, and it was declared in said release and discharge, that the said sum was paid by said Richard Lamb, for, and at the request of said defendant Charland, in order that the said

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Richard Lamb might be, as he thereby was subrogated in and to all the rights, claims, privileges and mortgages of the said Dame Marie L. A. Boyer, and the Hon. Joseph R. Thibaudeau, *es qualité*, to the extent of the said sum of $5,600, it being in said release and discharge stated that said sum and a further sum of $1,000 then and there paid and discharged, form together the balance of consideration moneys stipulated payable to the said Dame Boyer and Thibaudeau, *es qualité*, under said deeds above mentioned and referred to, of Picard and Charland as aforesaid;

"Considering that by reason of the premises, and by law, the said Richard Lamb was, on the 15th of March, 1884, and is legally subrogated in all the rights, privileges and hypothecs of the said Dame Boyer, and Hon. Joseph R. Thibaudeau *es qualité* under the said deed of sale from them, before Durand, Notary Public, dated the 22nd of November, 1881;

"Considering that the mortgage and claim of the said Octave Desrosiers mentioned in the said 10th item of said report of distribution should rank after the claim of said Richard Lamb, as subrogated in the rights of said Dame Boyer and Hon. Joseph R. Thibaudeau, and under said deed of obligation and mortgage from said defendant Charland to said Richard Lamb on the 15th of March, 1884, and should have been so collocated;

"Considering that the property sold and seized in this cause is the same property as that affected by said *bailleur de fonds* claim and by the said mortgage, *hypothèque*, of the 15th of March, 1884, from said Charland to said Lamb;

"Considering that by the documents filed in this cause, it appears that there is an error in the entry made by the registrar in his books about the deed of release and discharge aforesaid;

"Considering that the said contestant Richard Lamb has proved the facts alleged in his said contestation, and that the answer filed to said contestation by said Joseph Octave Desrosiers is unfounded;

"Doth maintain the said contestation of the said Richard

Lamb, and declare that the said items numbered 10, 12 and 13 of said report of distribution are irregular, null and void; Doth order that said report be reformed accordingly, and that said Richard Lamb be collocated therein for the principal sum of $5,600, and $530.23, being the interest due thereon at six per cent. per annum from the 15th of September, 1884, to the date of sheriff's sale of said property in this case, namely the 13th of April, 1886, amounting the said principal and interest together to $6,130.23, and that any claim which the said Joseph Octave Desrosiers may have arising out of his said obligation of the 26th of January, 1883, may be collocated and rank in the reformed report of distribution to be prepared after the said claim of said Richard Lamb, the whole without costs."

The facts were briefly as follows:—

On the 22nd of November, 1881, Madame Amos sold to one Picard a certain lot of ground, retaining a *bailleur de fonds* claim upon it for $6,600, part of the purchase price. She registered this deed on the 10th of December, 1881. Picard subsequently sold to one Charland. Charland hypothecated the lot to appellant Desrosiers for a loan. This hypothec was registered by Desrosiers on the 30th of January, 1883, and ranked as second claim on the lot coming after that of Madame Amos. Subsequently Charland paid off Madame Amos with funds furnished by respondent Lamb, who claimed in the Court below that in and by the deeds of 15th of March and 19th of March, 1884, effecting this payment to Madame Amos, he stood subrogated in all the rights of Madame Amos including her *bailleur de fonds* claim.

The question turned entirely upon the interpretation of the two deeds of 15th and 19th of March respectively. The last named deed was noted by the registrar as a complete discharge of the *bailleur de fonds* claim, and no mention was made in the registrar's books of any subrogation to Lamb. The city having seized and sold the property, the registrar gave his certificate omitting the *bailleur de*

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fonds claim of Madame Amos as discharged, and upon this the prothonotary prepared his report of distribution collocating appellant Desrosiers as having the first hypothec, and ranking him before respondent Lamb. Respondent Lamb contested this report on the ground that being subrogated in the rights of Madame Amos he should rank before Desrosiers. The deeds of 15th and 19th of March, 1884, contained the following clauses:

By that of 15th of March Charland acknowledged to have borrowed from Lamb $5,600, for money paid in extinction of the balance of the *bailleur de fonds* claim of Madame Amos, and for the security of its repayment Charland then and there hypothecated the property to Lamb. It was further set out that the declaration contained in this deed was made in order that said lender Lamb, may be as he hereby is, subrogated in and to all the rights, claims, mortgages and privileges of said Dame Amos. By the deed of 19th of March, 1884, Dame Amos acknowledged to have received, "of and from the said Joseph Charland of Montreal, law student, first the sum of $1,000 currency, and secondly, at the execution thereof, from Joseph Alfred Charland by the hands of Richard Lamb, of Montreal, $5,600, who had paid the same for and at the request of the said Joseph Alfred Charland, in order that the said Richard Lamb may be, as he hereby is, subrogated in and to all the rights, claims, mortgages, and privileges of the said appearers to the extent of the said sum of $5,600, and interest." The deed concluded, however, as follows: "And of and from all claims and demands resulting from and derivable under the said "deeds of sale, the said appearers do hold quit, release "and discharge the said Joseph Alfred Charland and assigns for ever, and do also release and discharge the lots "of land and premises of and from the mortgage thereon "created as security for the payment of the said sum and "interest, which said lots are, &c."

March 21, 22, 1888.]

Cruickshank, for the appellant:—

Among other grounds raised the point that the regis-

trar's certificate made *prima facie* proof of its contents, and that it should have been contested by Lamb.

J. L. Morris, Q.C., for the respondent, in answer to this, relied upon the judgment of the Court of Review in *Currier* v. *Boucher*, 6 Q. L. R., p. 282, and further contended that he should not suffer by the errors of the registrar.

April 7, 1888.]

DORION, CH. J., [after stating the facts] :—

There is an apparent conflict in the terms of the deed of 19th of March. It first declares that $1,000 has been paid by Charland before the passing of the deed, and that $5,600, balance of the price, has been paid at the date thereof by Lamb, who is thereby subrogated without guarantee to the rights of the creditor; and then it goes on to declare that the *bailleur de fonds* claim is discharged. We must reconcile in so far as we can any inconsistencies in the deed, and get at the real intention of the parties. We cannot presume that the first clause was inserted without any object, and must give some effect to it. It is clear from this first clause that the parties intended that there should be subrogation. We believe that the last clause was intended to discharge the lot for the $1,000, which had been paid by the debtor Charland, and not as to the $5,600 paid by Lamb, to which the subrogation applies, otherwise this subrogation clause could have no meaning. It is to be remarked that the first clause is in writing, while the second is in print. In case of contradiction the rule is to consider the written clause, as more likely to contain the real intention of the parties.

As to the error in the registration this cannot be invoked against Lamb. He is not responsible for the registrar's mistake. It may be noticed that Desrosiers was not prejudiced at all by the wrong entry in the registrar's books and the registrar's erroneous certificate. His hypothec was taken as a second one to rank after that of Madame Amos. However, even had he been prejudiced he could not deprive Lamb of his rights under the deed giving

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subrogation. We are unanimously of opinion to confirm the judgment.

Judgment confirmed.

Cruickshank & Cressé, attorneys for appellant.
Morris & Holt, attorneys for respondent.
(J. K.)

April 7, 1888.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, JJ.

THE COMMERCIAL MUTUAL BUILDING SOCIETY OF MONTREAL
(*Plaintiffs in Court below*),
APPELLANTS;

AND

THOMAS SUTHERLAND ET AL.
(*Defendants in Court below*),
RESPONDENTS.

Partnership—Misappropriation by partner of other moneys to use of firm—Liability of firm—Limited partnership—Arts. 1875, 1877, 1880 *C. C.—Registration—Special Partner.*

HELD:—1. Where one of the partners in a firm misappropriated moneys belonging to a certain building society, of which he was the secretary-treasurer, and applied them to the uses of his firm, entering them in the books as "loans"—not from himself but from others, that these moneys, although obtained by him tortiously without the privity of his co-partners, having gone into the business of the firm, the members of the firm were jointly and severally responsible to the original owners for the amount thereof, to the same extent as if the loan had been made legitimately.

2. Where the $15,000 capital originally put into a firm by a special partner had become impaired, and was reduced to less than $9,000 at the time a new firm was formed, that the declaration then made, that the capital put in by the special partner was $15,000, was a false statement within the meaning of Art. 1877, C. C., and entailed upon the special partner the liability of an ordinary partner.

3. That the omission to use the name of one or more of the general partners in the partnership name makes a special partner liable as a general partner, under Art. 1880, C. C.

The appeal was from a judgment of the Superior Court, Montreal (GILL, J.), Dec. 27, 1886, by which the appellants' action against the respondents was dismissed. The following was the judgment of the Court below :—

" La Cour, etc....

" Considérant que la demanderesse base son action sur les faits suivants, savoir, que le défendeur, Peter Fulton, étant le secrétaire-trésorier de la demanderesse et touchant en cette qualité des deniers dont il était comptable à la dite demanderesse, en aurait détourné et se serait approprié $3,742.45, qu'il aurait employés pour les affaires d'une certaine société commerciale en commandite nommée " The St. Henry Carriage Leather Company," maintenant en faillite, et dont les trois défendeurs étaient les membres ; Peter Fulton et Thomas Sutherland à titre de gérants et Henry Speid à titre de commanditaire, mais la demanderesse soutient qu'ils sont tous trois solidairement responsables tant parce que les défendeurs Sutherland et Speid connaissaient depuis longtemps les détournements de Fulton et qu'il en employait le fruit dans les opérations de la dite société en commandite, et qu'ils lui ont fait déserter le pays lorsque les choses se sont découvertes, que parce que le défendeur Speid n'avait pas en réalité versé dans la dite société en commandite les $15,000 de capital que leur déclaration enregistrée comportait qu'il y avait mises, et encore parce qu'ils avaient pris pour nom social le nom d'une compagnie, ce qui est contraire à la loi, dit la demanderesse, et ce qui les rendait tous des associés en nom collectif; à quoi les dits défendeurs Sutherland et Speid ont tous deux plaidé, mais séparément, le premier d'abord par défense en droit dans laquelle il prétend que les allégations de la déclaration ne suffisent pas pour démontrer qu'il est responsable vis-à-vis la demanderesse, et par exceptions et défenses au mérite tous deux niant les faits qui leur sont imputés et affirmant que ni eux ni la dite société en commandite n'ont rien à faire avec les détournements de Fulton, que les déclarations et opérations de la dite société comme telle, ont été faites et con-

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duites légalement et que la demanderesse ne peut en rien les rechercher en justice à cet égard ;

" Considérant que les allégations de la déclaration de la demanderesse seraient suffisantes en droit pour en soutenir les conclusions, si, d'ailleurs, elles étaient appuyées par la preuve, rejette la défense en droit du défendeur Thomas Sutherland, avec dépens contre lui mais compensés jusqu'à due concurrence par les dépens ci-après accordés contre la demanderesse en sa faveur ;

" Considérant qu'il est prouvé que le défendeur Speid a réellement versé dans la dite société en commandite la somme capitale de $15,000 et, même, de plus, une forte somme additionnelle comme argent prêté ;

" Considérant que notre article 1880 C. C. concernant le nom des sociétés en commandite, décrète que le commanditaire sera réputé gérant, s'il permet que son nom figure dans la raison sociale ou le nom de la société, mais nullement qu'il en sera de même si l'on adopte pour raison sociale un nom de compagnie, et que le motif qui a fait adopter la disposition de cet article du Code, à savoir, ne pas tromper le tiers ou le public en leur offrant le nom d'un associé dont la responsabilité, contrairement aux apparences, est limitée, ne se trouvant point dans l'emploi d'un nom de compagnie, il n'y a pas lieu d'étendre l'application du dit article à l'espèce soumise ;

" Considérant qu'il n'est pas prouvé que les défendeurs Speid et Sutherland aient connu les détournements de Fulton des fonds de la demanderesse avant le jour ou la veille de son départ, et qu'il n'est pas non plus prouvé qu'ils avaient favorisé sa fuite, les paroles qu'a pu dire le défendeur Speid à ce sujet, à part qu'elles ne sont pas telles qu'elles doivent le rendre responsable vis-à-vis les créanciers de Fulton n'étant prouvées que par le dit Fulton lui-même, dont le témoignage est fort suspect ;

" Considérant que le fait capital de la cause, c'est-à-dire que les deniers de la demanderesse appropriés et détournés par Fulton auraient été employés dans les affaires de la dite société " The St. Henry Carriage Leather Company," n'est appuyé que sur le témoignage de Fulton lui-

même et sur les entrées faites par lui dans les livres de la dite société, et que l'intérêt de Fulton est tel, en autant qu'en faisant condamner ses associés à rembourser ses détournements, ce serait pour lui réussir à donner à ses actes l'apparence d'affaires régulières et leur enlever le caractère de criminalité, le réhabiliter en quelque sorte à lui permettre de rentrer au pays où il n'a pu venir rendre témoignage que sous l'égide d'un bref de protection, qu'on ne peut lui accorder entière crédibilité et qu'il serait nécessaire que son témoignage et ses entrées fussent corroborées par des circonstances ou des faits antérieurs pour prévaloir, ou, au contraire, son témoignage ne se base quant aux montants que sur ses entrées et tandis qu'il prétend y trouver que le montant employé dans les affaires de la commandite est exactement le montant détourné ci-dessus mentionné de $3,742.45, un homme expert dans les chiffres et les comptes, le témoin A. W. Stevenson, y trouve que d'après les dites entrées même, ce montant ne serait que de $1,166.73 ;

" Considérant que l'action est en conséquence mal fondée tant en droit qu'en fait contre le défendeur Speid, et qu'elle n'est pas suffisamment prouvée contre le défendeur Sutherland, et qu'il n'y a lieu de la maintenir que contre le dit défendeur Fulton ;

" Condamne le dit Peter Fulton à payer à la demanderesse la susdite somme de $3,742.45 avec intérêt depuis le 9 juin 1885, et les dépens d'une cause *ex parte* y compris comme frais d'enquête la taxe du dit Peter Fulton, comme témoin, ainsi que tous frais faits pour son assignation et le tiers du coût de sa déposition, et a débouté et déboute la demanderesse de son action quant aux défendeurs Speid et Sutherland, avec dépens distraits à leurs procureurs respectifs, sauf la compensation ci-dessus quant au défendeur Sutherland."

Jan. 20, 1888.]

W. H. Kerr, Q. C., and *C. B. Carter*, for appellant :—

The grounds upon which the appellant relies to make the respondent Speid a general partner, are two :

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1st. Because at the date that he entered into partnership with Fulton and Sutherland, viz., on the 17th March, 1884, he, Speid, did not contribute the sum of $15,000 to the capital stock of the partnership, as falsely alleged in the declaration which he signed and which was filed.

2nd. Because the partnership was carried on under the name of a corporation, whereas a limited partnership could only be carried on under a partnership name, in which the names of one or more of the general partners could be used.

With regard to the first ground, the law as laid down in the Civil Code requires that persons contracting limited partnerships should comply with certain formalities before the partnership could be deemed to be formed, as will be seen by the following articles:

"1875. Persons contracting limited partnerships are "bound to make and severally sign a certificate con- "taining:—

"1. The name or firm of the partnership.

"2. The general nature of the business to be carried on.

"3. The names of all the general and special partners, "distinguishing which are general and which special, "and their usual place of residence.

"4. The amount of capital stock contributed by each "special partner.

"5. The period at which the partnership commences "and that of its termination. Such certificate is to be made, "filed and recorded in the form and manner prescribed in "the statute specified in article 1871."

Now it is perfectly clear from the evidence, that while it may be true that Speid had contributed $15,000, as capital to the firm which he entered into on the 1st of August, 1822, the declaration of which was signed on the 7th March, 1883, at a time when James McCausland was a partner, yet that partnership was dissolved on the 14th March, 1884, by the retirement of McCausland, and on the 17th March, 1884, when the new partnership was formed, Speid's capital of $15,000 had been impaired to

the extent of some $8,000, by losses which the business had suffered.

Moreover, the certificate of the second partnership was not signed or enregistered until the 16th May, 1884, whereas it was formed on the 17th March of that year.

Art. 1876 of the Code says, that the partnership is not deemed to be formed until the certificate is made, filed and recorded, and Art. 1877 provides that if any false statement be made in the certificate, all the persons interested in the partnership are liable for its obligations, in the same manner as ordinary partners.

The capital which Speid had put into the previous partnership having been impaired on the 17th March, 1884, date when the new partnership was formed, to the extent of $8,000, by losses, the declaration which he signed on the 16th May, 1884, was a false statement and made him liable as an ordinary partner.

McCausland having ceased to be a partner in the old firm, it was necessary, he being a general partner, that the new declaration should be made and filed as provided by Art. 1879.

It may be true that the respondent Speid lent moneys to the firm, but these moneys were not placed to his capital account, they were placed to loan account, and he claims to be a creditor upon the firm. The firm became insolvent, and while he did not, as Mr. Stevenson says, file any claim, he instituted an action and pretends to be a creditor. It is respectfully submitted that he cannot claim upon the assets of the business against other creditors until they are all paid in full the amount of their claims, and this is the law as laid down in Art. 1886 of the Code, which says, that in case of the insolvency or bankruptcy of the partnership, no special partner is allowed under any circumstances to claim as a creditor until the claims of all the other creditors of the partnership have been satisfied. In the present instance the claims of the other creditors have not been satisfied in full. On the contrary, the whole of the estate was sold out by the trustee, and a dividend of 60 per cent. declared.

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With regard to the second point. Art. 1880 of the Civil Code provides, that the business of the partnership is to be conducted under a partnership name or firm, in which the name of the general partners only, or of one or more of them, is used; and if the name of the special partner be used in the firm with his privity, he is deemed a general partner.

Now in the present case neither of the names of the general partners appear, but the firm was carried on under the name of a corporation, viz., The St. Henri Carriage Leather Co.

Falconer, for respondent Sutherland:—

In order that the partnership be bound by the act of one of its members it is necessary that the partner contracting be the agent express or implied of the partnership; that his act if not within the scope of his legal powers be ratified by the partnership; or in the words of Art. 1867 C. C. "The partners are liable for obligations "contracted by one of them only when the obligation is for objects which are in the usual course of dealing and business of the partnership or are applied to its use."

Mr. Fulton cannot be regarded as the agent of the partnership in obtaining appellants' moneys. Such an act as this is not "within the usual course of dealing and busi- "ness of the partnership." [C.C. 1866, 1867.] It is on its face, and according to the allegations of appellants' declaration, a tort. A partner cannot be the agent of the partnership to commit a tort in respect of matters outside the ordinary business of the partnership, and in order to hold the partnership liable for such tort, some knowledge or ratification of the act of the partner committing the wrongful act must be shown. To quote the words of Lindley on partnership:—"To attach responsibility in "case of a tort: 1. It is necessary that he (*i.e.* the partner "sought to be held) shall have authorized it in the first "instance. 2. That he shall have made it his own by "adoption. 3. Or that it shall have been committed by "the agent in the course of and as part of his employ- "ment." [3rd ed. p. 314.] P. 315. "As a rule the wilful

" tort of one partner is not imputable to the firm." 318.3. " The firm cannot be treated as receiving what one part- " ner receives otherwise than as its real or ostensible " agent, unless the money actually comes into the posses- " sion of or under the control of the other partners." 327.5. " If a partner being a trustee improperly employs money " of his cestui que trust in the partnership business, or to " pay the partnership debts, this alone is not sufficient to " entitle the cestui que trust to obtain prepayment of his " money from the firm."

P. 328.7. [Contrasting such a case with another in which the partnership was held] " But in this case the " money came into the hands of the firm in the ordinary " course of its business, whilst in the case now under " consideration it is supposed to come otherwise. Lia- " bility must therefore attach to the firm, if at all, on " wholly different principles, and the fact that the firm " had the benefit of the trust moneys is not sufficient to " render it responsible for them. To be liable, the firm " must be implicated in the breach of trust, and this it " cannot be unless all the parties either knew whence " the money came or knew it did not belong to the parties " making use of it. Knowledge on the part of one part- " ner will not affect the others, for the fact to be known " has nothing to do with the business of the firm." As a matter of fact there is no pretence by appellants that Mr. Fulton acted as the agent of the St. Henry Carriage Leather Company in taking their money; nor do they attempt to show or even allege any knowledge on the part of respondent Sutherland of Fulton's acts. The only pretence appellants can have to hold respondent is set forth in the allegation in their declaration, that the moneys embezzled " were employed and made use of in " the business of the St. Henry Carriage Leather Company " in which firm respondent was a partner." Appellant's claim therefore, if maintained at all can be maintained only on the authority of Art. 1867, C.C. " The partners " are liable to obligations contracted by one of them in " his own name only when the obligation is for objects

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"which in the usual course of dealing and business "of the partnership are applied to its use." Respondent submits that admitting for the moment, (what is by no means proved as declared by the judgment appealed from,) that the embezzled moneys were applied to the use of the partnership, that this is not an obligation contracted by one of the partners in his own name within the meaning of Art. 1867. This article is evidently meant to cover the case of a contract entered into by a partner in his individual name but really for the partnership, *i.e.*, it covers the case in which the partnership stands to the partner contracting in the relation of undisclosed principal to agent—such a case, viz., as that of *Maguire* v. *Scott*, 7 L.C.R. 451, cited at the end of the article, on which case and on the authorities cited in support of the judgment therein rendered, the codifiers have based this article of the code, and has no reference to a *délit*. The use of the phrase "in his own name" shows this; and this interpretation of the article is in accord with the rule laid down by the English authorities quoted above. Appellants, therefore, must look to Fulton who alone has wronged them, for the recovery of their debt.

J. C. Hatton, *Q.C.*, and *C. A. Geoffrion*, *Q.C.*, for respondent Speid:—

The appellants examined four witnesses in support of their demand, the principal one being the defendant Fulton, whom they had induced to return to Montreal from New York, under a promise of protection by the appellants, to enable them to establish their claim against the other defendants, Sutherland and Speid. One witness was examined on behalf of the defendant Sutherland, but none on behalf of the defendant Speid.

As above remarked, Fulton was the chief witness for the appellants, and through him they sought to establish their claim and to fasten liability on his co-defendants Sutherland and Speid. Mr. Justice Gill refused to accept the evidence of Fulton uncorroborated by other evidence. An examination of the evidence of Fulton will establish the justice and correctness of the holding of the Honour-

able Judge. The desire of Fulton to establish the claim of the appellants against Sutherland and Speid in his own interest is apparent throughout. His attempt to fasten a knowledge of his misdeeds upon Sutherland and Speid is utterly unsupported. A perusal of his evidence will disclose the pitiable position he occupied in the witness box, which the learned Judge below had the benefit of witnessing. Notwithstanding his efforts to show that Mr. Speid was in some way liable for his misdeeds, he was forced to admit that Mr. Speid had not only paid into the limited co-partnership the full sum of $15,000, but that the co-partnership was indebted to Mr. Speid in a sum of $6,720 over and above the $15,000 so paid in. The books of the Company also made these facts clear.

These points being clearly established, it is unnecessary, as far as Mr. Speid is concerned, to make further comment upon the evidence. Having paid into the limited co-partnership the full sum of $15,000, which he undertook as the special partner to pay, and never having intermeddled with the management of the business, no further liability can attach to him. He is unfortunate in having not only lost his $15,000 so paid in as capital, but the large sum of money, in addition, which he was induced to lend to the concern.

April 7, 1888.]

CROSS, J. (for the majority of the Court):—

The Society had a secretary-treasurer, named Fulton, who became a partner in an alleged limited partnership under the name of the St. Henry Carriage Leather Company, in which there were three partners, Speid, a limited partner, as having contributed $15,000; Sutherland and Fulton were general partners, the whole as appeared by registration on the 16th May, 1884, of a partnership formed 17th March, 1884. It appears that Fulton appropriated money which came into his hands, belonging to the Building Society, to the uses of the Carriage and Leather Company, and entered it in the books of the last named company as loans, without stating from whence it

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proceeded. The amount of this misappropriation is considerable.

The present action is brought by the Building Society to recover the moneys so misappropriated from Sutherland, Speid and Fulton, the members of the partnership composing the Carriage and Leather Company, whom the Building Society contend are liable as having received the money through Fulton, and who are jointly and severally liable from having failed to observe the formalities required by law in cases of limited partnerships, to entitle special partners to exemption from general liability beyond the amount contributed towards capital.

The declaration specially charges that Fulton, being secretary-treasurer of the plaintiff's Society, in that capacity received large sums of money on account of and belonging to the Society; that on the 16th May, 1884, Fulton, Sutherland and Speid signed a declaration whereby it was declared that on the 17th of March, 1884, they had formed a limited partnership under the name of the St. Henry Carriage Leather Company, in which Peter Fulton and Thomas Sutherland were the general partners, and that Henry Speid was a special partner, that he had contributed as his share of the capital $15,000 in cash; that Fulton, while such secretary-treasurer, between the 1st May, 1884, and the 1st of April, 1885, took and appropriated moneys belonging to the Commercial Building Society to the amount of $3,742.45, which he employed and made use of in the business of the St. Henry Carriage Leather Company without the knowledge of the directors, and to the profit of the St. Henry Carriage Leather Company. That on the 15th of April, 1885, the St. Henry Carriage Leather Company became insolvent and Fulton absconded from the city of Montreal. That Sutherland and Speid were previously aware that Fulton had so misappropriated and employed said moneys, and that it was upon their advice that he had absconded; that said Speid had known of it for six months previously. That Speid had not at the time contributed $15,000 to the capital of the St. Henry Carriage Leather Company as falsely declared in the de-

claration made and registered by that Company, that he had in fact only contributed $7,600. That the assumption of the name St. Henry Carriage Leather Company was illegal, and that one or more names of the general partners should have been used. By reason whereof they were alleged to be general partners jointly and severally liable, and in the prayer it was asked that they should be declared general partners and should be condemned jointly and severally.

Fulton allowed the case to go against him by default.

Sutherland pleaded, first, by demurrer, that the declaration disclosed no liability on the part of himself or the St. Henry Carriage Leather Company, which demurrer was dismissed.

He further pleaded a *défense en fait*, and specially that Fulton did not put moneys of the Commercial Building Society into the St. Henry Carriage Leather Company; that even if he did, such moneys were not received or acquired by Fulton as a member of the partnership of the St. Henry Carriage Leather Company, nor in the usual course of their business, and were not put into said business with the knowledge or consent of Sutherland, or in such a way as to bind him or his co-partnership; that he was ignorant of any such misappropriation, and if made, Fulton alone was responsible for it.

Speid pleaded denying liability and denying any knowledge of the alleged misappropriation, asserting that if Fulton had so used or misappropriated any moneys of the Commercial Building Society it was without his (Speid's) knowledge, and neither he nor the St. Henry Carriage Leather Company could be held responsible for the same; that if even so used it was a matter between the said last named company and Fulton alone. Speid, however, admitted having signed the declaration of partnership, that he was a special partner, having contributed the amount therein stated; also, that the partnership in addition owed him for loans to the extent of $10,000.

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Building Society by Fulton is established, as well as his having absconded.

The only evidence to their having been employed in the business of the St Henry Carriage Leather Company is by Fulton himself, who was brought from New York under a writ of protection to give evidence in the case. He swears to the fact of having used the moneys which he received as secretary-treasurer of the Commercial Building Society in the business of the St. Henry Carriage Leather Company; of having entered the different amounts, as so applied by him, in the books of the last named company; of having, during a period of eighteen months, furnished monthly balance sheets to Speid, in which these moneys were entered as loans, and having told Speid that they were trust moneys, which he might be called upon to pay at any time; also, of having disclosed the actual facts of the case to Speid before he left the country, and having been advised by Speid to leave.

The entries of the moneys as advanced by Fulton are inserted in the books of the St. Henry Carriage Leather Company as loans, mixed with entries of moneys he took from the St. Andrew's Society, distinguishing certain of them by initials, but some being entered without initials. He says the St. Andrew's Society was repaid and the balance of the loan fund belonged to the Commercial Union Building Society.

On this evidence the Judge of the Superior Court maintained the action against Fulton, but dismissed it as regards Sutherland and Speid, chiefly on the ground that their liability could only be established by believing the evidence of Fulton, an interested party, whom he could not consider worthy of credit under the circumstances, without some other corroborative testimony which did not exist in the case.

I think the learned judge attached too much importance to the interest that Fulton might have in the issue, and was scarcely warranted in concluding that Fulton's evidence was wholly without corroboration, or else he must have overlooked the fact of the entries in the books of the

St. Henry Carriage Leather Company crediting these moneys to loans. Had this been otherwise than as represented by Fulton, the defence could have easily shown that Fulton's statement was erroneous. Taken as true, which I conceive we are bound to do, it is strong corroboration of Fulton's evidence, nor do I conceive that the unfortunate circumstances in which Fulton is placed sufficient to discredit his direct and positive statements.

On behalf of the defence it is urged that the act was a tortious one on the part of Fulton, and that being no parties to the tortious act, Sutherland and Speid are not responsible for it. It is true that they are not responsible for the tort, but the money having gone into the partnership, which was benefited to the extent thereof, the partnership is surely bound to restitution of the amount received by it. Fulton did not enter the money as so much embezzled, but as a loan; as a partner his authority extended to procuring loans for the benefit of the partnership, it did not make the transaction less a liability of the partnership that got the money than if it had been a loan legitimately obtained. True, it might have been otherwise if he himself was the original owner and put the money into the partnership as his own money, that is, as a loan proceeding from himself; on the contrary, he entered it as proceeding from another, and in his conversation with Speid described it as trust money, which really it was not, but belonged to the party who now claims to be the creditor. Assuming that they were trust moneys, the counsel for Speid has cited authorities from the English books to show that the partnership is not responsible to the cestui que trust for trust moneys put into the partnership by the trustee, and an old case, *Ex parte Apley*, in bankruptcy, is cited to maintain this proposition. I should not judge this case to be of much authority, but the ground on which it is placed distinguishes it completely from the present case. The trustee was there treated as himself the creditor of the partnership, and a debtor to the cestui que trust, not as having put the money into

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the partnership in the name of the trust, but himself putting the money into the partnership, although it was the property of the trust, that fact not being communicated to the partnership. While in the present case, although it may be conceded that the partnership was not liable for the tort committed by Fulton, the other partners not being privy to the tort, yet while Fulton alone was liable for the tort, his capacity to bind the partnership by the use he made of the money still remained; as their agent, he was competent to bind them as for borrowed money. When he put this money into the partnership he represented to his partners that it was borrowed, not borrowed by himself on his own credit, but borrowed by the partnership through his instrumentality, and made entries in the books indicating that it was loans, and the partnership had the benefit of the money and profited by it. They were warned of the liability by these entries, and Speid had monthly balances for a long time in which these loans were entered. There is the strongest possible reason for holding the partnership liable for these moneys.

Having, then, established the liability of the partnership, it follows that the general partners, Fulton and Sutherland, are jointly and severally bound. As regards the remaining partner Speid it becomes our duty to enquire what kind of partnership it was, and whether Speid's plea of special partnership can avail him as a defence. The general rule, of course, is joint and several liability of partners. It is incumbent on the party claiming exemption from this rule to affirmatively establish an exception in his favor. Limited liability is admitted provided the requirements of the law in that behalf have been observed. It is argued for the appellant that Speid failed in two essential conditions to entitle him to claim exemption from general liability. First, on the occasion of the retirement of McCausland, when the declaration of partnership was registered, which is mentioned in the appellant's declaration, the statement it contained that Speid, as a special partner, had contributed to the capital $15,000 in cash was untrue; and second, that the name

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of the St. Henry Carriage Leather Company, by which the partnership was known and carried on its business, did not contain the name of either of the general partners, as required by art. 1880 of the Civil Code. The proof shows that the first of these objections was well founded. Although Speid had put into the original partnership with McCausland $15,000, when the new partnership was formed in accordance with the declaration of date the 16th May, 1884, his capital had been impaired by losses to the extent of $8,000, thus reducing it to less than $9,000 as the amount he put into the new partnership, and not $15,000 as stated in said declaration of partnership. This appears by the evidence of Peter Fulton and of Archibald Stevenson. Said declaration was therefore in violation of art. 1875 C. C., and a false statement entailing on him, Speid, the liability of a general partner, in terms of art. 1877 C. C. And secondly, the name of the partnership, "The St. Henry Carriage Leather Company," under which their business was conducted, did not conform to the requirements of art. 1880, C. C., no name of either of the general partners appearing in the firm, a requisite to exclude a special partner from general liability.

For these reasons I do not see how it is possible to avoid the conclusion that the partnership of the St. Henry Carriage Leather Company are responsible to the Commercial Mutual Building Society for the money abstracted therefrom by Peter Fulton, and put into the business of the former of these two companies in the name of loans to said company. It is a hard case for Speid, who appears to have been victimized not only by the loss of his capital put into the business, but as well by the loss of a considerable amount advanced by him as loans. He is therefore not to be condemned for any more than we find established by evidence that appears to us conclusive. I think that the amount which may be safely taken as established is $1,669.33, with interest from the date of the service of process, in which Sutherland and Speid will be condemned.

The judgment of the Superior Court will be reversed,

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and judgment for the above amount given against Sutherland and Speid jointly and severally.

The judgment is as follows:—

"The Court, etc....

"Considering that it is proved that Peter Fulton, one of the defendants in this cause, while Secretary-Treasurer of the appellants, 'The Commercial Mutual Building Society,' took and misappropriated moneys of the said Society to a large amount, and being at the same time a general partner in, and bookkeeper of, the partnership business carried on by him and the respondents under the name of the 'St. Henry Carriage Leather Company,' he applied and put into their said business certain of the monies which he had so misappropriated to the extent, after allowing for any that may have been returned, of $1,669.33, and entered the same in the books of the said St. Henry Carriage Leather Company as loans, thereby implying that the said moneys had been borrowed by him for and on the credit of the said company, whereby the said company had the benefit of, and profited by, the said moneys and were debtors for the amount thereof, to the said Commercial Mutual Building Society;

"Considering that the said St. Henry Carriage Leather Company and the said Henry Speid failed to observe the necessary formalities required by law to entitle the said Company to be deemed a limited partnership, or the said Henry Speid to be restricted in his liability to that of a limited partner, or to be other than a general partner in the said business;

"Considering that the declaration of partnership of the said St. Henry Carriage Leather Company, of date the 16th May, 1884, was untrue as regards the amount of capital put into the business by the said Henry Speid at the formation of the partnership thereby declared, viz., the renewed partnership after the retirement of McCausland;

"Considering that neither the name of the said Peter Fulton, nor that of the said Thomas Sutherland, as general

partner, was used in conducting the business of said partnership;

"Considering that it results from the foregoing that the said Peter Fulton, Thomas Sutherland and Henry Speid became and were liable jointly and severally as general partners in the said firm for the transactions thereof, and were and are liable jointly and severally to make good and pay to the said Commercial Mutual Building Society the said sum of $1,669.33;

"Considering therefore, that there is error in the judgment rendered by the Superior Court in this cause on the 27th of December, 1886, in so far as regards the said Thomas Sutherland and Henry Speid;

"The Court of Our Lady the Queen now here doth reverse, annul and set aside the said judgment in so far as regards the said Thomas Sutherland and Henry Speid, and proceeding to render the judgment that the said Superior Court ought to have rendered in regard to the said Thomas Sutherland and Henry Speid, doth adjudge and condemn the said Thomas Sutherland and Henry Speid, jointly and severally to pay and satisfy to the said Commercial Mutual Building Society the said sum of $1,669.33, with interest thereon from the 15th of June, 1885, the date of service of process in this cause, until paid, with costs as well of this Court as of the said Superior Court, (the Honorable Mr. Justice Tessier dissenting)."

Judgment reversed.

Kerr, Carter & Goldstein, attorneys for Appellant.

Robertson, Fleet & Falconer, attorneys for Respondent Sutherland.

J. C. Hatton, Q. C., attorney for Respondent Speid.

(J. K.)

June 20, 1888.

Coram DORION, C. J., CROSS, TESSIER, CHURCH, JJ.

ROBERT PICKFORD ET AL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

ROBERT DART ET AL.,
(*Defendants in Court below*),

AND

JOHN BLACK,
(*Intervenant in Court below*),
RESPONDENTS.

Right to freight—Mortgagee of ship—Privilege for necessary supplies.

HELD:—(Reversing the decision of the Superior Court, M.L.R., 3 S.C. 424),

1. That where there are two distinct hirings of a vessel, the voyage under each hiring is a separate transaction, and freight upon the first hiring is earned by the vessel's arrival and readiness to deliver at the port of destination thereunder, although by the second hiring she may be engaged to convey her cargo to another port without unshipping the same at the first port.
2. Freight so earned may be collected by the master of the vessel, he being also principal owner, and may be applied by him in payment of an antecedent debt owed by him.
3. The furnishers of necessary supplies upon a completed voyage, having, prior to possession taken by the mortgagee, obtained a draft from the master and principal owner upon the consignees, covering the amount of such supplies, thereby obtain an assignment of freight earned upon such voyage *pro tanto* and are entitled to receive the same in priority to the mortgagee.
4. The mortgagee of a vessel, in taking possession, becomes entitled to all freight accruing due, subject to the claim for necessary supplies for the last voyage, which is privileged, and ranks before him. His rights are not greater than the owner's rights.

This appeal was from a judgment of the Superior Court (LORANGER, J.), reported M.L.R., 3 S.C. 424, dismissing the plaintiffs' action.

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The facts of the case are sufficiently set out in the judgment of the Court given below.

March 24 and 26, 1888.]

A. B. Major for the appellants :—

Freight is due upon the arrival of vessel at port of delivery and readiness to deliver, irrespective of actual delivery ; and in this case, the freight upon the first voyage from Bahia to Halifax was earned and due at Halifax, and the transaction was distinct from the subsequent voyage from Halifax to Montreal :—

Carver, Carriage of goods by sea (1885), pp. 542, 543, 544, 547.

Pothier, des Louages Maritimes, No. 59.

Foard, on Merchant Shipping, p. 306.

Dakin v. *Oxley*, 33 L. J. (C. P.) 115.

The mortgagee's right to freight only arises when he takes possession of the vessel, and only extends to freight accruing due :—

Keith v. *Burrows*, 2 A. C. 646.

Liverpool Marine Credit Co. v. *Wilson*, 7 L. R. (Ch.) 507.

Willis v. *Palmer*, 29 L. J. (C. P.) 194.

Gardner v. *Cazenove*, 1 Hurl. & N. 423.

A mortgagee upon taking possession assumes all the liabilities of the owner, and becomes liable for necessaries supplied to the master, so that in the present case the plaintiffs are in any event entitled to recover the amount paid out by them for necessary disbursements :—

Jackson v. *Vernon*, 1 H. Bl. 114.

Chinnery v. *Blackburne*, 1 H. Bl. 117 (note).

Rich v. *Coe*, Cowp. 636.

Farmer v. *Davies*, 1 T. R. 108.

Alexander v. *Simms*, 23 L. J. (Eq.) 721.

Green v. *Briggs*, 17 L. J. (Eq.) 323.

Plaintiffs are also entitled to be paid by privilege as furnishers of necessary supplies for the last voyage :—

C. C. 2383–2386, Nos. 1 & 2.

C. C. 6, No. 2.

H. Abbott, Q. C., for the respondents, cited :—

Brown v. *Tanner*, L. R. 3 Ch. 597.

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Beldon v. *Campbell*, 6 Ex. 885.
Beynon v. *Godden*, 3 L. R. Ex. Div. 263.
Sir Henry Webb, 13 Jurist, 639.
Reynolds & Gex, 38 L. J. (Q. B.) 251.
The Scio, 1 Adm. 353.
The Two Ellens, 4 L. R. P. C. 162.
Farmer v. *Phillips*, 42 L. J. (Ch.) 125.

The mortgagee, upon taking possession, is entitled to all the freight then unpaid. The voyage from Halifax to Montreal was not a separate transaction, but was merely a continuance of the original voyage from Bahia to Halifax. The claim of the plaintiffs is a purely personal one against Dart, and they have no priority whatever against the mortgagee, nor any lien upon the ship or the freight.

A. B. Major in reply :—

No case cited gives the mortgagee any greater right than that of receiving the freight accruing due when he takes possession. Here the mortgagee did not take possession at Halifax, where the first freight became due, and therefore he has no claim whatever upon that freight.

The Admiralty cases cited do not apply, this being a case at common law and under an entirely different jurisprudence.

As to when freight is earned, see *Duthie* v. *Hilton*, 4 L. R., C. P. 138.

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Cross, J. :—

The barque Maggie Dart was built by or for the respondent Robert Dart, at Maitland, Nova Scotia, in the year 1882, and he was registered as the sole owner thereof and from the first held the position of master. The appellants Pickford & Black appear to have furnished part of the supplies for the outfit of the vessel, for which they were never wholly paid ; their account remained unsettled for a balance down to the year 1885.

At an early date, John W. Parker acquired four sixty-fourth shares in the vessel and continued thereafter to own said shares, Dart remaining proprietor of the remainder, and being also captain or master of the vessel.

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John Black, of Glasgow in Scotland, who had also contributed to the outfit of the Maggie Dart, and who had a current account with Robert Dart, to whom he continued to furnish advances, on the 11th of August, 1882, took a mortgage from Robert Dart on his sixty sixty-fourth shares of the vessel, to secure his, John Black's, account for supplies, and advances made and to be made, thus getting a preference over Pickford and Black, who retained no security on the vessel.

On the 28th of January, 1885, at Bahia, in Brazil, Robert Dart, then still master and owner for 60 sixty-fourth shares, chartered the vessel to Morerne & Co. to carry a cargo of sugar from Bahia to New-York or Halifax in consideration of twenty shillings per ton, to be paid on unloading and right delivery of the cargo.

The Maggie Dart arrived at Halifax on the 18th April, 1885. In place of discharging her cargo in conformity with her charter party, a new agreement was entered into, whereby Robert Dart agreed with the Canada Sugar Refining company, acting by Hugh D. McKenzie, their agent, in consideration of $2 per ton of additional freight, to proceed to, and deliver the cargo at Montreal.

Pickford & Black, who were ship brokers and agents at Halifax, furnished the necessary supplies to the vessel for her voyage from Bahia to Halifax, as well as for that to Montreal, for which their account amounted to $1,804.71.

The freight from Bahia to Halifax was estimated to amount to $3,758.41, and that from Halifax to Montreal to $1,664.66.

McKenzie, as agent for the Canada Sugar Refining Company, who appear to have become interested as purchasers of the cargo or otherwise, advanced $2,000 to Dart in a cheque on account of freight, which Dart immediately handed over to Pickford & Black, not on account of their recent account for necessary supplies, but on their old account for outfit, for which they held no security; he also gave them an additional draft on the Canada Sugar Refining Company for $2,500, declared to be for necessary

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disbursements and advances, payable conditionally on the right delivery of the cargo of the Maggie Dart at Montreal.

The Maggie Dart arrived at Montreal on or about the 26th of May, 1885, whereupon John W. Parker notified the Canada Sugar Refining Company not to pay the said draft to the said Pickford & Black, and served a protest upon them, forbidding them to pay the said draft.

On the 27th of May, 1885, John Black, the mortgagee, acting by his duly authorised agent, John W. Parker, claimed under his said mortgage, and took possession of the Maggie Dart at the port of Montreal.

On the 29th of May, 1885, Pickford & Black made a formal notarial demand upon the Canada Sugar Refining Company for the payment of said draft, at the same time forbidding the said Canada Sugar Refining Co. to pay over the balance of said freight to any but themselves under pain of having to pay it a second time.

On the 3rd of June, 1885, Pickford & Black in the present suit which they then took against Robert Dart and John W. Parker as registered owners of the Maggie Dart, issued an attachment before judgment, under which they seized the vessel, and attached the freight in the hands of the Canada Sugar Refining Co. In this action they claimed to recover $2,500, the amount of the draft, for which they alleged that they had furnished necessary supplies to the Maggie Dart.

The garnishees, the Canada Sugar Refining Co., appeared, and by their duly authorized agent, declared that they owed for balance of said freight $2,803.40. The amount according to the charters would have been a little over this sum, but it seems they claimed some deduction for damages; their declaration was not contested.

John W. Parker appeared and pleaded to the action, as after mentioned.

John Black, of Glasgow, intervened, and as mortgagee and as having taken possession of the vessel on the 26th of May, 1885, claimed to be entitled to the freight earned, but remaining unpaid at the time he took possession, in-

cluding as well the freight from Bahia to Halifax as from the latter place to Montreal, or the balance thereof, after the deduction of the $2,000 paid by McKenzie to Dart at Halifax, which they contended should apply to the payment of the supplies furnished by Pickford & Black to the Maggie Dart at Halifax on the occasion of her last voyage, which they claimed was more than sufficient to cover the cost of these supplies, which only amounted to $1,804.71; that Dart had no authority to apply this sum to his own individual private indebtedness, as he pretended to do; that the voyage from Bahia to Montreal was one continuous voyage, the whole of the freight for which enured to the benefit of the mortgagee.

Pickford & Black, in reply, contended that the voyage from Bahia to Halifax was a completed voyage, the full freight for which was earned on the arrival of the vessel at Halifax, and her readiness to deliver the cargo there; that it was competent for the master of the vessel to receive the freight there and that they, Pickford & Black, were justified in receiving the $2,000 from Dart, paid by him, not on account of supplies being then furnished, but on account of his previous indebtedness as expressly agreed to by him. That their claim for necessary supplies by them then furnished remained good and unliquidated; that Dart had a right to assign to them the balance of the freight due at Halifax and the freight to become due at Montreal in payment of said necessary supplies, for which their claim remained good to be paid by privilege on said vessel and out of the freight.

The defendant, John W. Parker, pleaded the same grounds in defence of the action, as those set up by John Black in his intervention, claiming that Pickford & Black had been overpaid for their disbursements by the $2,000 received from McKenzie, and that the action as regards him should be dismissed and the attachments quashed.

After proof, the Superior Court dismissed the action of Pickford & Black, quashing, as a consequence, the seizures, from which judgment they have taken the present appeal.

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We are of opinion that the proof shows what must in this case be considered two distinct and separate charter parties or the equivalent thereof, viz. two separate hirings of the vessel, one from Bahia to Halifax, by which the relative rights of the parties interested must be determined at that point. That Dart from his position as captain or master of the vessel was entitled to collect the freight earned on the voyage from Bahia to Halifax, that having collected the $2,000 at Halifax, and having the money under his control, he had it in his power to pay that sum to Pickford & Black on their old claim, if such was the understanding between them, which seems to be well established by the proof. As far as Pickford & Black were concerned, it was immaterial to them where Dart got the money. As far as Parker, owner of one-sixteenth, was concerned, it was a misapplication of his share of the earnings of the vessel, for which he would have his recourse against Dart, the same as for any other moneys he in his quality of master collected for freight; but money in whatever manner collected by the master of the vessel for freight, had to be considered as moneys chargeable to him and for which he was accountable. If he collected more than his share of the freight Parker might be entitled to indemnify himself out of the remainder uncollected, but the furnishers of necessary supplies of the vessel for the last voyage would have a priority of claim on the uncollected freight. Pickford & Black having done diligence and got a draft to cover as well their supplies on the voyage from Bahia to Halifax, as on the voyage from Halifax to Montreal, were entitled to be paid by privilege out of the freight of the first voyage the necessary supplies for that voyage, and out of the freight of the second voyage for the necessary supplies of that voyage. They did not lose their privilege for the first voyage, because they got a draft for its payment by the consignee at Montreal; that is, they got a draft which included this payment, and they were, as a matter of course, privileged for their supplies on the last voyage, and that in preference to the mortgagee, who could not claim

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the freight save subject to the charges of the last voyage. As regards the mortgagee, Pickford & Black were, under the circumstances, entitled to their necessary disbursements on both voyages, because they had taken steps to collect the first, and got an assignment of it included in the draft upon the Canada Sugar Refining Company, and as regards the second, they were privileged by law, as a matter of course, so soon as the freight became payable. It was therefore immaterial as regards the mortgagee what part of the claim was applicable to the first and what to the second voyage; the whole of it, therefore, amounting to $1,804.41 has to be allowed payable out of the freight for which the Canada Sugar Refining Company is liable, and the possession taken by the mortgagee at Montreal on the 27th May, 1885, is only available to him to secure the freight due after the payment of this privileged claim of Pickford & Black. According to this view of the matter, Pickford and Black were entitled to follow the vessel and claim on her freight to the extent of this sum of $1,804.71, and John Black, the mortgagee, was entitled to the surplus of the freight on Dart's 60 sixty-fourth shares of the vessel. The issue of the seizure and attachment at the instance of Pickford and Black was therefore justifiable, as otherwise their security must have disappeared.

The judgment of the Superior Court must, as a consequence, be reversed, and the owners of the vessel, viz., Dart for fifteen-sixteenths, and John W. Parker for one-sixteenth, be condemned to pay Pickford and Black the amount of their said advances, to wit, said sum of $1,804.71 with interest and costs, the condemnation against Dart to extend to the full amount of the draft by him given to Pickford & Black, which includes the said amount of $1,804.71 due for necessary disbursements, and the moneys in the hands of the Canada Sugar Refining Company will be ordered to be paid as follows: The said sum of $1,804.71, with interest from the date of the service of their action and costs, to Pickford & Black in extinction of their privileged claim for necessary sup-

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plies; and the surplus, if any, in the proportion of fifteen-sixteenths to the said John Black as mortgagee, and the remaining 16th of such surplus, if any, claimable by the said John W. Parker.

The judgment is as follows:—

"Considering that the respondent, Robert Dart, at Bahia, in Brazil, on the 28th January, 1885, being then master and owner for sixty sixty-fourth shares of the Barque 'Maggie Dart,' chartered the said vessel to Messrs. Moreira, Irucio & Co., to carry a cargo of sugar from Bahia aforesaid to New York or Halifax, for which the charterers were to pay at the rate of 20s. stg. per ton,—said freight amounting to $3,752.41 for said voyage;

"Considering that said voyage was performed and said vessel arrived at Halifax, on the 18th of April, 1885, and was then ready to deliver her cargo at Halifax, pursuant to said charter, and on the 21st of April, 1885, the said Robert Dart was entitled to collect and receive the said freight at Halifax aforesaid; that the Canada Sugar Refining Company, being interested as the consignees of said cargo, on the 21st of April, 1885, acting by their duly authorized agent and attorney at Halifax, Hugh D. McKenzie, made a new agreement in writing with said Robert Dart, whereby, in consideration of the additional freight of $2 per ton, the said Robert Dart agreed to deliver the said cargo of sugar at the port of Montreal;

"Considering that the appellants Pickford and Black furnished the necessary disbursements to said vessel 'Maggie Dart,' as well for her said voyage from Bahia to Halifax, as for her voyage from Halifax to Montreal;

"Considering that said Robert Dart had a right to collect the freight due for said voyage of the 'Maggie Dart' from Bahia to Halifax, and was personally accountable to any others interested in said vessel for any claims they may have had on said freight or the application thereof made by the said Robert Dart;

"Considering that said Robert Dart, at Halifax aforesaid, on said 21st of April, 1885, collected and was paid by the said Hugh D. McKenzie, on behalf of the said Canada

Sugar Refining Company, the sum of $2,000 on account of the freight of the said vessel, and had control of the same as of his own monies, being personally accountable to his co-owner John W. Parker, or any others concerned, for any share or interest they might have had therein;

"Considering that the said Robert Dart, on the said 21st of April, 1885, at Halifax aforesaid, paid the said Pickford and Black the sum of $2,000 cy., not, however, on account of the necessary disbursements by them furnished to said vessel, 'Maggie Dart,' for her said voyages, nor did the said Pickford and Black receive the same on account of said disbursements, but on the contrary, the said sum of $2,000 cy. was paid by the said Robert Dart to the said Pickford and Black, and by them received, on account of a previous claim for which they held no lien or security upon said vessel, and the said Robert Dart, at the same time, made and delivered to the said Pickford and Black, a draft upon the said Canada Sugar Refining Company for the further sum of $2,500 cy., purporting to be for necessary disbursements for said voyages of said vessel, but being in fact only in part for such necessary disbursements which only in the whole amounted to $1,804.71, the surplus over that sum being to cover the balance of the old account, including insurances, said draft being made payable on the right delivery of the said cargo at the port of Montreal;

"Considering that the said Pickford and Black did not relinquish, but on the contrary retained, their privilege upon said vessel, and upon the freight thereof, for the payment of their necessary disbursements, having done diligence for the recovery of the said disbursements for the voyage from Bahia to Halifax, and been provided with a draft by the said Robert Dart, assigning to them the freight to the extent of $2,500, and being entitled by privilege to the payment out of the freight of the voyage from Halifax to Montreal, of their necessary disbursements for that voyage;

"Considering that said vessel 'Maggie Dart' was built at Maitland, in Nova Scotia, in the year 1882, for the said Robert Dart, as the sole owner thereof, and the respondent

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John W. Parker soon afterwards became owner and had assigned to him four sixty-fourth shares in the said vessel, and ever since, the said Robert Dart, for sixty sixty-fourth shares, and the said John W. Parker, for four sixty-fourth shares, have been in the said proportions, the registered owners of the said vessel, and as such are liable to the said Pickford and Black, for the necessary disbursements by them furnished to the said vessel;

"Considering that the said Pickford and Black made advances for supplies to the said Robert Dart at an early date, part of which were employed in the building and outfit of said vessel, but for which said Pickford and Black retained no lien or security on said vessel, but held for the same a personal claim against the said Robert Dart, hereinbefore mentioned as the old account of the said Pickford and Black;

"Considering that John Black, intervening party in this cause, also made advances to the said Robert Dart from an early date, and continued said advances, and by deed duly executed on the 11th August, 1882, and duly registered the same day, the said Robert Dart mortgaged his said sixty sixty-fourth shares in the said vessel 'Maggie Dart' to the said John Black, for monies, supplies and outfits furnished and to be furnished, and that his account for said monies, supplies and outfit is established at and to the amount of £3,206.18 stg., for which he held a valid mortgage upon said sixty sixty-fourth shares of said vessel;

"Considering that after having established a default on the part of the said Robert Dart to pay the said amount of £3,206.18 stg. at Montreal, on the 27th of May, 1885, the said John Black, mortgagee and intervening party in this cause, by his duly authorized attorney and agent in that behalf, took possession of the said vessel 'Maggie Dart,' and thereby became entitled to the freight earned by the said vessel, but remaining unpaid, on said sixty sixty-fourth shares of said vessel so owned by the said Robert Dart and by him mortgaged to the said John Black, subject to a priority of claim on the part of the said Pick-

ford and Black, on the whole of the freight, to be paid out of the same their said necessary disbursements for said vessel, amounting to $1,804.71;

" Considering that on the 26th day of May, 1885, at Montreal, the said John W. Parker, for himself and as the duly authorised agent and attorney of the said John Black, formally notified and forbid the said Canada Sugar Refining Company to pay the said freight in their hands, or the said draft of $2,500 cy. to any other than to him the said John W. Parker;

" Considering that on the 29th of May, 1885, the said Pickford and Black, having previously presented the said draft for payment to the said Canada Sugar Refining Company, and they refusing payment thereof, formally notified the said Canada Sugar Refining Company to retain in their hands out of said freight payable by them, sufficient to pay the said Pickford and Black the amount of the necessary disbursements by them furnished to the said vessel, which they claimed to be to the amount of said draft of $2,500 cy.;

" Considering that the present action has been instituted by the said Pickford and Black, to recover the amount of their claim for said necessary disbursements for said vessel 'Maggie Dart,' which they maintain amounts to the said sum of $2,500, and is not disputed by the said Robert Dart;

" Considering that the said John W. Parker, by his plea to the present action, contends that necessary disbursements made by said Pickford and Black, do not amount to said sum of $2,500 cy., and that they have been overpaid by said sum of $2,000 by them received from said Hugh D. McKenzie, and that said action as regards him, the said John W. Parker, should be dismissed, and the seizure and attachment herein taken quashed;

" Considering that said John Black has intervened in this cause, and claimed that the said Pickford and Black have been overpaid for their said necessary disbursements for the said vessel by the said $2,000 paid them by the

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said Hugh D. McKenzie; that the full amount of the freight of said two voyages should be paid to him as mortgagee, having taken possession of the said vessel at Montreal, on the said 27th of May, 1885, and that the seizure and attachment taken in this cause should be quashed, which pretensions are disputed by the said Pickford & Black, who contest the said intervention;

"Considering that the said Pickford and Black have established their right to recover from the said Robert Dart the said sum of $2,500 with interest, and to recover part thereof, to wit, the said sum of $1,804.71 with interest from said Robert Dart and John W. Parker jointly, in the proportion of their respective shares in the said vessel;

"Considering that the said John W. Parker failed to establish the material allegations of his plea so as to entitle him to the conclusions thereof;

"Considering that the said John Black proved and established so much of the allegations of his said intervention as to entitle him to recover the surplus (if any) of the freight on sixty sixty-fourth shares of said 'Maggie Dart' in the hands of the said Canada Sugar Refining Company, in case there should be more than enough of the entire freight in the hands of said Canada Sugar Refining Company to pay the said Pickford and Black their said necessary disbursements of $1,804.71 with interest and costs, and that the rest of said intervention with the conclusions thereof should be dismissed;

"Considering that said Pickford and Black had reason to apprehend that their security for the payment of their said necessary disbursements would disappear, and they would sustain damage and loss of their claim, were entitled to cause to issue, as they did, the seizure before judgment and attachment *en main tierce* to seize the said vessel and attach the freight in the hands of the said Canada Sugar Refining Company;

"Considering that the said Canada Sugar Refining Company, on the 17th of June, 1885, by their duly appointed and authorized agent and attorney, declared that they had in their hands and owed for balance of said freight the

sum of $2,803.30, which declaration has not been contested;

"Considering that for the reasons aforesaid there is error in the judgment rendered herein by the Superior Court at Montreal, on the 28th January, 1887, the Court of Our Lady the Queen, now here, doth cancel, annul, set aside and reverse the said judgment; and proceeding to render the judgment which the said Superior Court ought to have rendered, doth overrule and dismiss the plea of the said John W. Parker, and doth condemn the said Robert Dart to pay and satisfy to the said Pickford and Black the sum of $2,500, with interest thereon from the 3rd of June, 1885, and doth condemn the said Robert Dart and John W. Parker jointly, in proportion to their said ownership, to pay and satisfy to the said Pickford and Black, the sum of $1,804.71 included in the condemnation pronounced against the said Robert Dart, with interest thereon from the 3rd of June, 1885; and doth declare as well the seizure of the said vessel 'Maggie Dart,' as the said attachment of the freight thereof in the hands of the said Canada Sugar Refining Company, good and valid to the extent of the said sum of $1,804.71, with interest thereon from the said 3rd of June, 1885, and costs; and doth declare valid the intervention made in this cause by the said John Black, to the extent hereinafter stated, and doth order that out of the monies so in the hands of the said Canada Sugar Refining Company, the said Pickford and Black be paid, according to the sufficiency of the said monies and in discharge *pro tanto* of their said seizure and attachment, the said sum of $1,804.71, with interest and costs; and should there be a surplus, the fifteen-sixteenths of the said surplus to be paid to the said intervening party, John Black, on account of his said mortgage, and costs which are allowed to him only as in an *ex parte* suit, the principal pretentions of his intervention being overruled; the other sixteenth to remain subject to the rights and claim of the said John W. Parker; and the said Canada Sugar Refining Company are adjudged and condemned to pay the said monies so in their hands to the

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persons and to the extent above stated, with interest from the date of the signification upon them of the present judgment, with costs in favor of the appellants as well in the said Superior Court as in this Court, said costs to be taxed as in a cause of the first class. (The Hon. Mr. Justice TESSIER dissenting)."

Judgment reversed.

McGibbon & Major, attorneys for appellants.
Abbotts & Campbell, attorneys for respondents.
(A. B. M.)

June 20, 1888.

Coram DORION, C.J., TESSIER, CROSS, BABY and CHURCH, JJ.

THE MAIL PRINTING CO.,

(*Defendants in the Court below,*)

APPELLANTS;

AND

THE HON. RODOLPHE LAFLAMME,

(*Plaintiff in the Court below,*)

RESPONDENT.

Libel in newspaper and libel in pleadings—Incidental demand—Evidence as to truth of libel—Evidence of previous character of plaintiff—Verdict of jury in libel cases—Excessive award—Absence of material witness—Affidavit of juror as to motives of other jurors—Reading of unproved newspaper report to jury.

HELD:—1. That an incidental demand is sufficiently *libellée* if instead of setting out at length a libel complained of, it refers to an answer to plea immediately preceding, as forming part thereof.

2. That an incidental demand will not be rejected as illegally filed because it is not accompanied by a petition as required by Art. 152 C. C. P.

3. That under the laws of this Province an action lies for libellous allegations contained in pleadings.

4. That a plaintiff in an action for libel, who is attacked by an additional libel in the plea to his action, may proceed by incidental demand in order to obtain a condemnation for this additional libel.
5. That when the defendants in a jury trial have issued a *venire facias*, attended at the striking of the panel, proceeded to trial, and taken their chance of a favorable verdict, they cannot afterwards obtain a new trial on account of alleged defects in the assignment of facts for the jury.
6. That a new trial will not be granted because a material witness was absent, although he was duly subpœnaed and the proper conduct money was tendered him, when the party who called him neglected to apply for a postponement of the trial.
7. That evidence tendered by the defendant in an action of libel as to the previous conduct and character of the plaintiff was properly rejected as illegal, especially when such matters were not referred to in the pleadings.
8. (*By the majority of the Court*). That in actions for libel, the assessment of damages is peculiarly the province of the jury, and that a verdict of $6,000 for the newspaper libel complained of in this case, and of $4,000 for the libellous allegations of the plea, was not so excessive as to lead to the inference that the jury were led into error or actuated by improper motives.

(*Per* BABY and CHURCH, JJ., *diss.*):—

That the verdict of $6,000 for the libel in the newspaper was excessive, and justified the defendants in asking for a new trial.

Semble, that if the Court reduced these damages to $1,000, leaving the damages for the libel in the plea undisturbed, so as to make the total condemnation $5,000, the judgment maintaining the verdict should be confirmed.

The appeal was from a judgment of the Court of Review, rendered on the 31st of March, 1886 (reported in M. L. R., 2 S. C. p. 146), confirming a verdict of a jury which awarded a sum of $10,000 damages to the plaintiff (respondent) in an action for libel; $6,000 being awarded for the original libel contained in a newspaper published by the defendants (appellants), and $4,000 for an additional libel contained in their pleas to the action.

The plaintiff by his action claimed $10,000 damages for the publication of an article entitled "Improved Methods," which appeared in the editorial columns of the Toronto "Mail" of the 8th December, 1884. This article, of which the portion complained of is printed—in the opinion of the Hon. Chief Justice, referred, among other things, to the election tactics of the liberal party in the general election of 1878, when the plaintiff was Minister of Justice and

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liberal candidate for the county of Jacques-Cartier, and more especially to an infamous fraud practised on the electors of that county by means of a ballot-box with a false bottom, which was fraudulently stuffed with voting papers in favour of the liberal candidate. The editors of the "Mail" referred to the plaintiff as the inventor and perpetrator of this fraud and as having boasted of its success.

The defendants met this action by a plea of justification, alleging in substance as follows:—

That the article complained of was published in good faith in the interests of the public with the view of condemning corrupt practices at elections, and was written in a bantering and humorous style, without purporting to be a literal statement of facts. That it was true that the plaintiff had taken a prominent position in public affairs and occupied the position of Minister of Justice of the Dominion of Canada, but that his prominence was not based on honourable or successful conduct, but on the contrary, arose out of various disgraceful and dishonourable transactions in which the plaintiff was engaged during his public career. That the plaintiff was utterly barren of any public reputation, and that in fact while he held the office of Minister of Justice, he was grossly incompetent for said office, neglected his duties as such minister, and rendered himself by drunkenness, dissipated habits and otherwise, unfit for the discharge of his duties. That before holding office and while a member of parliament, the plaintiff acquired great notoriety and prominence as a party to a law-suit in which it was proved that he and his co-defendants had been guilty of fraudulent and dishonest practices. After a detailed account of the plaintiff's candidature for the county of Jacques Cartier in 1878, and of the ballot-stuffing fraud practised on the voters at one of the polls, the plea alleges that this fraud, which is characterized as "the grossest and most villainous outrage ever perpetrated on the electors of Canada," was devised, perpetrated and acquiesced in by the plaintiff, who, after its exposure, in violation of all

propriety and public decency, applied to the Dominion Government for a judgeship and pressed his claim upon the Premier, but was refused the appointment, largely on account of his dishonorable and disgraceful proceedings in connection with said election.

As soon as this plea was filed, the plaintiff made an incidental demand complaining of the additional libel, and claiming a further condemnation of $5,000 therefor.

The defendants then met this incidental demand by an exception to the form, and by a plea to the merits, stating that the allegations of the principal plea were made by them in good faith in the belief that the same were true, in which belief they still persist, and contending that these allegations are by law privileged.

The defendants' exception to the form having been dismissed by Mathieu, J., the issues were closed in the usual way, and the defendants, who had declared their option that the case should be tried by a jury, took the necessary steps to bring on the trial. Upon their motion, the facts were fixed for the jury, and the days for striking the panel and for the trial were appointed. After having the panel struck, the defendants filed their fiat for a *venire facias* which was issued in due course, and on the 14th of January, 1886, brought on the trial before the Honorable Mr. Justice Johnson and a jury.

The trial lasted four days, and resulted in a verdict in favour of the plaintiff, the jury awarding him damages, to the extent of $6,000 for the libel contained in the newspaper, and of $4,000 for the additional libel contained in the defendants' plea.

The plaintiff moved in due course before the Superior Court, sitting in Review, for judgment on the verdict, and the defendants presented counter motions in arrest of judgment, for judgment *non obstante veredicto*, and for a new trial.

On the 31st of March, 1886, the Court of Review unanimously granted the plaintiff's motion and rejected those of the defendants.

The defendants thereupon appealed from this judgment,

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and from three interlocutory judgments which had been rendered in the case, one by Mathieu, J., on the 22nd of June, 1885, dismissing their *exception à la forme*, another by Taschereau, J., on the 14th of October, 1885, granting their motion for a jury trial, and the third by Torrance, J., on the 30th of December, 1885, fixing the facts for the jury and the days for striking the panel, and for the trial respectively.

The appeal was first heard before four judges, who, being unable to agree, ordered a rehearing. The case was then re-argued before five judges.

D. Macmaster, *Q. C.*, and *C. H. Stephens*, for the appellants, urged the following reasons in support of the appeal:—

1. The incidental demand is insufficiently *libellée*, as it does not set forth the libellous passages complained of, and alleges no damages, but merely refers to the libel set forth in an answer to plea, and avers that the plaintiff is entitled to a further condemnation of $5,000.

2. The incidental demand is irregular, as it is not accompanied by a petition as required by Art. 152 C.C.P.

3. The incidental plea was never answered by the plaintiff, and therefore, under Art. 144 C.C.P., the allegations thereof must be held to be admitted.

4. The matters complained of in the incidental demand are not the subject of an incidental demand. They are not "connected with the right claimed" by the principal suit, as required by Art. 149 C. C. P., § 2:—*Pigeau*, Proc. Civ., 337; *Coutume de Paris*, Art. 106; *Pothier*, Proc. Civ. vol. 7, ch. 2, sec. 7, p. 37; *Gilbert sur Sirey*, Code de Proc., Art. 337, note 1; *Carré*, Procédure, vol. 3, p. 192; *Bæto* v. *Laine*, 3 La. An. Rep. 546; *Knox* v. *Thompson*, 12 La. An. Rep. 114; *Harris* v. *Opelousas*, 16 La. An. Rep. 140; *Keene* v. *Relfe*, 11 Louis. 304; *Kemp* v. *Amacker*, 13 La. An. Rep. 65; *Gadbois* v. *Trudeau*, 15 L. C. J. 271.

5. The libel contained in the plea is privileged:—*Henderson* v. *Broomhead*, 28 L. J. Ex. 360; *Odgers*, p. 186; 3 *Russell*, C. & M., 180.

6. The assignment of facts for the jury is insufficient

and defective, and this gives the defendants a right to a new trial under Art. 426 C.C. P. § 1. The jury should not have been asked whether the publication was *injurious* or *justifiable*.

7. The trial judge misdirected the jury in not drawing any distinction between words written without malice in the public interest, and words written without such excuse, in giving no instructions as to the measure of damages, and in omitting to warn the jury against accepting the opinion of the Court as to facts or against accepting the plaintiff's evidence in his own behalf.

8. The affidavits filed in support of the motion for a new trial, show that the jury must have been influenced by prejudice and by improper motives. That of the foreman of the jury establishes that one of the jurymen urged considerations entirely foreign to the case, to induce his fellow-jurors to award a large verdict.

Article 428 C.C.P. only excludes the affidavit of a juror as to his *own* motives, and a juror who is not guilty may prove misconduct on the part of the others:—*Aylett* v. *Jewell*, 2 W. Bl. 1299; *Deacon* v. *Shreve*, 2 N. J. 176.

The affidavits of McKim and Wallace show that the French portion of the jury were likely to be prejudiced against the defendants on account of the hostility of the "Mail" to the partisans of Louis Riel. Feeling ran high at the time of the trial, and the French press was exceedingly bitter against the appellants' newspaper.

9. Illegal evidence was admitted by the trial judge, notwithstanding defendants' protest. The plaintiff's counsel was allowed, during his address to the jury, to read to them a newspaper report of a verdict of $8,000 rendered a few days previously in Toronto in an action for libel against a newspaper.

10. Legal evidence tendered by the defence was rejected by the trial judge. The plaintiff, in his declaration, alleged that he enjoyed the esteem and respect of his fellow-citizens, and that his private character had been damaged. The defendants attempted to prove that the plaintiff's fame was so disparaged that the libel could not have in-

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jured him. They asked the plaintiff himself and one of his witnesses, whether it was not a notorious fact that the plaintiff lived in public adultery with the wife of another man. They also asked another witness whether his reputation had not been blemished by certain legal proceedings in which the plaintiff and several other persons had been proved guilty of fraudulent practices. And they also asked a member of parliament as to the plaintiff's reputation as a Minister of Justice. All these questions were ruled out by the trial judge, although the balance of authority is in favour of admitting such evidence in mitigation of damages :—*Williams* v. *Callender*, Holt, N. P. R. 307 ; *Rodriguez* v. *Tadmire*, 2, Esp. C. 720 ; *Ellershaw* v. *Robinson*, Lanc. Sp. Ass. 1824, (cited in 2 Starkie, 468) ; *Mawby* v. *Barber*, 2 Starkie, 470.

11. The Hon. Alexander McKenzie, an important witness for appellants, failed to appear at the trial, although duly served with a subpœna and tendered conduct money. Appellants were prejudiced by the loss of this evidence, which, as appears from the affidavit of W. D. Hogg, would have materially helped their case. Under Art. 426 C. C. P., sec. 15, this gives the appellants the right to a new trial.

12. The damages awarded are excessive, and the Court has power to order a new trial :—*Hewlet* v. *Cruchley*, 5 Taunt. 279 ; *Simpson* v. *Pitman*, 13 Ohio, 365 ; *McConnell* v. *Hampton*, 2 Johns. Rep., 234 ; *Sampson* v. *Smith*, 15 Mass. Rep. 365 ; *Dom. Tel. Co.* v. *Silver*, 10 S. C. R. 238 ; *Venning* v. *Steadman*, 9 S. C. R. 206 ; *Massie* v. *Toronto Printing Co.*, 11 O. R. 362 ; *Belt* v. *Lawes*, L. R. 12 Q. B. D. 356.

C. A. Geoffrion, *Q. C.*, and *E. Lafleur*, for the respondent :—

1. The plaintiff's supplementary claim is sufficiently set forth by reference to his answer immediately preceding, and there can be no obscurity in this method of pleading.

2. The incidental demand need not, on pain of nullity, be accompanied by petition under Art. 152 C. C. P. The constant practice to the contrary has been judicially recognized.

Lionais v. *Lamontagne*, 20 L. C. J. 303.

3. The failure of plaintiff to answer the incidental plea does not involve an admission of the allegations thereof. The plea is purely negative, and requires no answer. But even when a plea is affirmative, it is held, in the absence of an answer, to be answered generally, and the absence of such answer has been held not to be an admission of the allegations thereof under Art. 144 C.C.P.

Lagrange v. *Carlisle*, 8 L. C. J. 182.

Studacona Ins. Co. v. *Trudel*, 6 Q. L. R. 31.

4. An incidental demand is the proper procedure for obtaining damages for the libel contained in the plea. The Court of Review correctly interpreted Art. 149 C. C. P., and it could not be in defendants' mouths to say that they had pleaded matters which had no connection with the suit. All the authorities confirm this interpretation.

Dareau, Traité des Injures, vol. II, p. 332; *Dalloz*, Répertoire, Vo. "Presse-outrage, No. 1171; Vo. "Avocat," No. 362; *Desperriers & Dusséré*, J. P. 16 août 1806, p. 460; *Jaubert & Beaucour*, J. P. Cass. 5 Mess. An. X, p. 629; *Rivière & Bellant*, J. P. 25 mars 1807, p. 762; *D..... & Grandjean*, J. P. 3 Brum. An X, p. 345; *Boitard*, Procédure Civile, Vol. I, p. 489; *Boncenne & Bourbeau*, Proc. Civ., Vol. V, p. 22; *Grellet-Dumazeau*, Vol. II, pp. 192, 387; *Chassant*, Délits de parole, Vol. I, p. 95.

5. Under our law, which is the French law, libels in pleadings are actionable when they are either 1st, foreign to the case, or 2nd, unfounded in fact:—*Domat*, Pt. II, p. 218; liv. III, tit. 3, Art. 3; *Guyot*, Répertoire, Vo. "Injure," p. 237*a*; *Dareau* (Ed. Fournel), Vol. I, p. 134, II, p. 12; *Jousse*, Justice Civile, Vol. II, pp. 450-54; *Pacaud* v. *Price*, 15 L. C. J. 281; *Hall* v. *Mayor of Montreal*, 27 L. C. J. 129.

6. The defendants waived any objections they might have urged against the assignment of facts by causing a *venire facias* to issue and bringing on the trial themselves. And, moreover, the questions objected to are taken from defendants' own suggestions of facts:—*Cannon* v. *Huot*, 1 Q. L. R. 139.

7. The defendants did not ask the trial judge to charge

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in any particular way. It was only the day before the hearing in Review that defendants filed written exceptions which they did not attempt to support at the argument in Review. In any event, the charge is sufficiently explicit and correct on all the points mentioned by appellants.

8. The affidavit of the foreman of the jury was rightly rejected, as Article 428 C. C. P. is not new law and must be extended to affidavits of jurors concerning the motives of their fellow-jurors:—*Lush's* Practice, p. 536; *Graham & Waterman*, New Trials, Vol. III, p. 1430.

The affidavit of Wallace as to the prejudice supposed to exist in the minds of the French jurors is negatived by the fact that three at least of the English jurors agreed in the award, and all the jurors were unanimous in declaring that the plaintiff had suffered a wrong, and that the defence had failed in their attempt at justification.

9. The alleged reading of a newspaper to the jury cannot be regarded as the admission of illegal evidence. It may have been addressed to the Court, and referred to simply by way of argument. This fact could not, at any rate, be satisfactorily established by the affidavit of a layman.

10. The first two questions which appellants endeavoured to put were clearly illegal. Even under English law it is a controverted point whether in cases of defamation, evidence impeaching the plaintiff's previous general character is admissible as affecting the question of damages.

And all authorities are agreed that, assuming such evidence to be admissible, it must be confined to the particular trait which is attacked in the libel, and as to this it can only furnish proof of general reputation, and must by no means condescend to particular acts of bad conduct. 1 *Taylor*, §§ 359-371.

Our own law, which is the French law, is entirely opposed to such evidence, even when it is covered by the pleadings or is in the direction of the charge contained in the libel:—*Ancien Denizart*, Vo. "Injure," No. 15; *Guyot*,

Répertoire, Vo "Injure," p. 237*a*; *Dareau*, ch. 1, sect. 1, No. 5; *Merlin*, Répertoire, Vo. "Injure," § 3, No. 3, p. 108*b*.

As to the third question, concerning the plaintiff's reputation as a Minister of Justice, it was subsequently answered by the witness without objection.

11. The appellants should have moved to postpone the trial, in order to obtain the evidence of Mr. Mackenzie. Having failed to do this, they cannot afterwards upset the proceedings which they brought on and made no attempt to delay:—*Lush's* Practice, p. 538; *Graham & Waterman*, New Trials, Vol. I. pp. 211, 212; *Cannon* v. *Huot*, 1 Q. L. R. 139.

12. The Court can only order a new trial "if the amount "awarded be so small or so excessive that it is evident "that the jurors must have been influenced by improper "motives or led into error." (C. C. P. Art. 426, § 11).

And English Courts have always shown great unwillingness to disturb verdicts in actions for personal torts, where there is no measure of damages, unless the verdict appears unreasonable and almost perverse:—*Townsend* v. *Hughes*, 2 Mod. Rep. 150; *Duberly* v. *Gunning*, 4 T. R. 651; *Leith* v. *Pope*, 2 W. Blacks. 1327; *Hewlett* v. *Cruchley*, 2 Taunt. 277; *Gilbert* v. *Burtonshaw*, Cooper, 230; *Belt* v. *Lawes*, L. R. 12 Q. B. D. 356; *Davis & Sons* v. *Shepstone*, L.R. 11 Ap. C. 187.

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SIR A. A. DORION, C.J., for the majority of the Court:—

The appellants were the defendants in the Court below in an action for libel brought against them by the respondent for the publication, on the 4th of December, 1884, in the "Toronto Mail," of which they were the publishers, of the following article:—

"IMPROVED METHODS:—Age cannot wither nor custom stale the infinite variety of Reform Statesmanship. Year by year, nay, day by day, the grand old party is improving its electioneering devices with a fertility of resource that is truly amazing. Nothing indeed can convey a better idea of the strides the party has made in intellectual development than the history of these devices. First we had the primitive and vulgar process of carrying the constituencies by the open purchase of votes. That was

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a clumsy and dangerous mode, and there was a want of refinement about it that makes one wonder how it was ever tolerated, either by the vendor or vendee. Still some old Reformers clung to it for years; in fact it was in vogue down to the time the party spent $40,000 in putting down bribery and corruption in London. Then came an improvement in the shape of buying steers and other agricultural products from the voter; and later on Mr. Norris' system of paying out cash, and charging it up to the Society for the Propagation of the Gospel in Foreign parts. Both these methods, however, were painfully insecure, and some of the best men in the party were caught red-handed. It was not, in fact, until 1878, that the party hit upon what may be termed the æsthetic contrivances of standard-elevating. In that year, it will be remembered, Mr. Laflamme, the Minister of Justice, patented an invention which promised to meet to the fullest, the demand for a safe and reliable method of electing the party's candidates. It was a cheap process, a false bottom to each ballot box being all the machinery required. Mr. Laflamme rightly calculated that letting out the manufacture of the false bottoms by tender would sooner or later involve discovery, for just as likely as not, some wretched Tory might have got the contract and peached. His proposition, therefore, was to buy the lumber by wholesale from some sound Liberal, like Mr. H. H. Cook, and have it made up into bottoms under the direct supervision of Gen. Patullo. Mr. Laflamme's boast that the party could by this means carry any given province, provided it had the making of the boxes, was undoubtedly well founded. But it is a matter of history that his brilliant scheme was burked by an intoxicated liberal, at the Ste. Anne's booth in Jacques-Cartier, who at the very first trial of the apparatus, stuffed over twice as many ballots into the box as there were electors in the whole of that division. It was a frightful instance of the injury done to public morality by the use of strong drink."

The appellants in substance pleaded that the article was published by them in a humorous style, that its contents were substantially true, and were not maliciously published, but on the contrary, were published in good faith, and in the public interest to condemn certain fraudulent and corrupt transactions of public men in connection with the public affairs of Canada, and that it was in the public interest that such fraudulent and corrupt transactions should be condemned and held to execration and shame.

The appellants further alleged in their plea: "that true it was that the respondent, as by him averred in his declaration, had taken a prominent part in public affairs and occupied for many years the position of minister of Justice for the Dominion of Canada, and was for several years preceding the publication of said article, publicly

known throughout the Dominion of Canada, and appellants prayed *acte* of such admissions in these respects: but they, the appellants, said that the respondent's prominence in these respects was not based upon honourable or successful conduct on the part of said respondent, but on the contrary, arose out of certain disgraceful and dishonorable transactions which he, the respondent, while a public man, was engaged in or connected with; that the respondent was a notoriously unsuccessful public administrator and utterly barren of any respectable public reputation, and in fact, while he held the office of minister of Justice, was grossly incompetent for the said office and signally failed in the discharge of his duties in respect of the said office, and in fact grossly neglected the same and rendered himself, by drunkenness, dissipated habits and otherwise, unfit for the discharge of his duties as minister of Justice for the Dominion of Canada, the whole of which was matter of general public knowledge in the House of Commons of Canada and with the public generally."

The appellants then went into the details of several disgraceful transactions which they imputed to the respondent, and held that these subjects were matters for public discussion for years, and that the respondent had not been injured by the article complained of, the appellants specially denying that at the times and periods in the respondent's declaration mentioned, the respondent enjoyed the respect and esteem of his fellow-citizens in the province of Quebec and throughout the Dominion of Canada — and the appellants declared their option for a trial by jury.

The respondent specially denied all the allegations contained in the appellants' plea, and made an incidental demand for $5,000 by reason of the additional libellous matter contained in said plea.

The appellants opposed the incidental demand by an exception *à la forme*, which was very properly dismissed, and the issues on the merits of both demands were tried by a jury who returned a verdict in favor of the respondent for $6,000 on the original demand and for $4,000 on the incidental demand.

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A motion for a new trial was made by the appellants and rejected by the Superior Court sitting in review. The present appeal is from this last judgment.

A number of technical grounds have been urged by the appellants in support of their motion for a new trial. The Court does not think it necessary to refer to them. There are only two grounds which we think it necessary to refer to here. The first is that the appellants were deprived of the evidence of the honorable Mr. Mackenzie, a material witness, who, although summoned did not appear at the trial. The answer to this is that the appellants knew before the trial whether the witness was a material one or not; they knew also that he was not present when the trial began, and if he was an essential witness, they should have asked for a postponement of the trial. They have consented to proceed without him and thereby waived their right to his testimony. They have accepted the chance of a favorable verdict and cannot, now that they have an unfavorable one, claim a new trial to have an occasion to examine him.

There is another reason for rejecting the demand for a new trial; it is that the facts which, it is stated, could be established by Mr. Mackenzie, could not have the slightest influence on the merits of the case, according to our law, which, as I have already said in another case this day, is the French law.

The other ground for a new trial, urged by the appellants and which is the main ground, is that the damages awarded are excessive.

We have already seen that there were two distinct libels on which the jury had to pronounce in this case.

The first, of which the respondent complained by his original demand, was that the appellants had imputed to him that, while he was minister of Justice for the Dominion of Canada, he had planned and prompted, in order to secure his own election, a fraud of such a gross character that two of his supporters, for their participation in it, were convicted and sentenced to several months' imprisonment.

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The second libel attacked in the most unjustifiable manner the character of the respondent as having been a public man and as a private individual.

The first libel was published more than six years after the respondent had ceased to be in public life and after the facts to which they referred, had taken place, and even if true that respondent had prompted these frauds, there was no adequate occasion to justify such attacks against the respondent, for according to our law, the truth of the facts injurious to the character of a citizen is no justification for their publication, unless there should be some public interest to be served thereby, and it is difficult to understand what public interest could be served by dragging the name of the respondent before the public in connection with these frauds, when he had for years withdrawn from public life and was no more as a private individual amenable to public opinion. The attempt to justify the publication of a libel by alleging the truth of the facts which are the subject matter of the libel, is under these circumstances, considered by the French law as an aggravation, and in no manner a justification of the libel. There is more, however, and the appellants have totally failed in their attempt to connect the respondent with the frauds they imputed to his initiation. It was conclusively proved that the respondent had nothing to do with these fraudulent practices used by some overzealous partisans of his, until after the election was over, and the appellants were therefore convicted of having published a false statement of a most injurious character against the respondent, six years after the whole facts had been publicly inquired into in a Court of criminal justice, and two of the perpetrators of the crime had been tried and punished, and no accusation had even been brought against the respondent in connection with them. The appellants have by their plea shewn that they were acquainted with all the circumstances of the case, and both the article and the manner in which they have met the

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demand for reparation show that they were actuated by malice in writing the article in question, and that they did it for the sole purpose of injuring him and through him the party he had been connected with while in public life.

There is no proper measure by which a jury can assess the exact amount of damages which should be awarded in such cases. It is quite possible that the respondent may not have suffered any material pecuniary injury from the publication of this libel. His standing may have been such that nothing said or written of him could have destroyed or diminished the confidence which his friends or the public reposed in him. But is a man in such a position to have no redress against such malicious attacks? Undoubtedly not; and the juries in such cases are the proper and, I might say, the only competent authority to determine, according to each particular case, the amount of damages to be awarded. They generally take into consideration the position and standing of the complainant, the degree of influence, the extent of publicity given to the libel, and the motives and degree of malice which may have actuated the publishers of the libel, and these are all proper elements to determine the amount of damages in every case. In the present case all these considerations are in the direction of an award for a large amount of damages. That the jury should have given a verdict for $6,000, although the sum is large, it is not such as can induce the Court, under the circumstances, to hold that the jury was moved by improper motives, or that they gave their verdict through error or mistake. The verdict cannot therefore be considered as excessive.

It is only in the last term or last term but one, that this Court was called upon to revise a judgment by which $12,000 damages had been given in the case for libel of *Brown* v. *The City of Montreal*, and although it was proved that the plaintiff had declared he had not suffered any pecuniary damages by the proceedings of the City Corporation, yet this Court awarded him $7,500

damages. I did not sit in that case, and therefore, I can with greater force use it as an argument in the present one. From a personal knowledge of the facts and circumstances of that case, I can safely say that neither the position of the parties nor the injurious nature and the occasion of the publication of the libel, nor the object for which it was done, could be compared to the same circumstances in the present case to warrant heavy damages. For these considerations alone, and if the trial had not taken place before a jury, I would not be disposed to reduce the damages.

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There is, however, another consideration which the Court holds to be conclusive on this point. This case was tried by a jury and, although the Courts in England invariably hold that they have a right to grant a new trial in cases where excessive damages have been awarded, yet there is no case to be found there wherein a new trial has been granted in a case of either libel or slander on the ground of excessive damages.

I have not been able to find one, and the two able counsel who so ably and exhaustively argued the case of the appellants were repeatedly asked if such cases have occurred in England, and have only been able to cite the case of *Belt* v. *Lawes*, decided in 1884.

This is an important admission on the part of the appellants, that there are no other cases to be found. In this case of *Belt* v. *Lawes*, which was for libel, and therefore quite applicable, the jury brought in a verdict for £5,000 sterling, just five times the amount of the verdict on the first libel in this case. A motion for a new trial was made on two grounds: that the verdict was against the weight of evidence and that the amount of the verdict was excessive.

There were three judges on the bench. One was for granting a new trial, and it does not appear whether it was on the first or on the second ground. Another judge was for maintaining the verdict, and the third for ordering a new trial, unless the plaintiff consented to reduce his claim and take judgment for £500 sterling. One of the

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judges had to give up his views to arrive at a decision, and the plaintiff having consented to accept a judgment for £500, an order was made reducing the verdict to that amount. The defendant appealed from this order; the plaintiff then withdrew his consent to a reduction of the verdict, and the three judges sitting in the Queen's Bench division of the High Court of Justice unanimously reversed the order made by the other judges, and restored the verdict of £5,000 sterling against the defendant.

This is not a case where a new trial has been ordered on account of excessive damages, since notwithstanding the consent of the plaintiff to a reduction, the Court refused a new trial and maintained the verdict in its entirety.

Three other cases have been cited by the appellants. The first is the case of *Massie* v. *The Toronto Printing Company*, 11 Ontario Reports, 362. This was a case for libel. The verdict was for $8,000. On a motion for a new trial for excessive damages, the Chief Justice was for granting a new trial; Mr. Justice Rose, who had presided at the trial, was for maintaining the verdict, and Mr. Justice Galt, now Chief Justice, was of opinion that if the article complained of had been an editorial article, he would have maintained the verdict, but that as the remarks complained of had appeared in the paper on a representation of their truth, he was for granting a new trial unless the plaintiff consented to reduce his claim to $1,000. Judge Rose had to agree to this, and the plaintiff having accepted this sum, there seem to have been no further proceedings.

This case cannot be held to be a binding precedent here, and if it were, it should be considered a weak one, for if the present case had come before the same judges, the new trial must have been refused, since the libel here emanated from the editorial staff of the "Mail."

The other two cases are those of the *Dominion Telegraph Co.* v. *Silver*, 10 Supreme Court Reports, 238, and of *Steadman*, decided by the Supreme Court of Canada. The circumstances of these two cases are so different from the pre-

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sent one that they may hardly be said to have any bearing upon it. Upon referring to the reports of the first case, it will be seen that a great difference of opinion existed on the Bench. It was a case of extreme hardship. The Court ordered a new trial, a majority of the judges holding that the damages were excessive, but not without dissent from others. The second case was a case of trespass and not of libel, and the judgment therefore cannot affect the present case.

As to the award of $4,000 for the second libel, I believe there can be no difference of opinion about it, and that a larger amount might have been awarded without being considered excessive, for I do not recollect of hearing of a more malicious and unjustifiable libel being published. Not satisfied with publishing in a most widely circulated paper the most injurious accusations against the respondent, they even attempted at the trial to prove beyond their allegations, by asking witnesses, if it was not true that the respondent lived in public adultery. If anything was wanting to show the animus with which the whole proceedings on the part of the appellants were carried on, this last attempt would show it conclusively.

The majority of the Court are of opinion that none of the grounds urged by the appellants are well founded, that the verdict is not excessive, and that the motion for a new trial was properly rejected, and the judgment will be entered accordingly.

CROSS, J.:—

I concur in the judgment of the Court. As regards the amount of damages, I should have been much better satisfied if the sum awarded had been considerably less, but this is one of those cases in which it is absolutely necessary to leave the entire decision of the question to the jury. There is no measure of damages in actions for personal torts, and in this particular instance it is impossible to say by what standard the jury should have been guided in estimating the damage caused by these libels to an ex-minister of Justice.

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Another ground urged for a new trial was that legal evidence had been excluded. The only ruling which at first gave me some difficulty was that which excluded the question put by appellants' counsel to Mr. Haggart, M.P., concerning Mr. Laflamme's reputation as a minister. If that question stood alone, I should have said that legal evidence was refused, but a little lower down in the deposition of the same witness it appears that substantially the same question was put and answered, so that the appellants have really no grievance on this score.

CHURCH, J. (*diss.*) :—

The appellants have raised a large number of objections in this case, but it does not seem to be necessary to deal with all these in detail inasmuch as the Court is unanimous in its view regarding them. There are, however, three points which appear to me to require notice. The first consideration is this,—that at the trial, certain evidence was refused which should have been admitted. I have looked over the evidence with great care, and I think that all the statements in the plea that the defendants should have been admitted to prove, they were allowed to prove. I would not disturb the judgment on that ground.

The next ground is that the Hon. Alexander Mackenzie, who was duly subpœnaed to attend at the trial, made default, and that in consequence, evidence which might have been obtained in favour of the appellants, was not obtained. I do not think this a sufficient ground for a new trial. It is shown that the appellants thought proper to proceed notwithstanding the absence of their witness. Each morning during the trial, the Hon. Mr. Mackenzie was called and made default, and yet the appellants proceeded without making any application to postpone the trial.

The next ground is that the verdict is so excessive that the Court is bound to infer that the jury was led into error. This case has been dealt with by the trial judge and the Court below as though two cases existed and two separate verdicts were rendered. The first of these

is based on the newspaper article which appeared in the "Mail." This article does not appear to me to be of a very serious nature, but is written in a light and bantering style. There is no reason to suppose that Mr. Laflamme suffered any real damage in consequence of the publication of this article, and in fact one of his witnesses says that he was too well known to be damaged by such an imputation, and that no one was misled as to his character. And yet, in the face of this evidence, the jury have assessed his damages at $6,000. If this were a criminal prosecution, and the judge were called upon to inflict a fine, the infliction of such a fine as $6,000 would undoubtedly be looked upon as an injustice. I therefore think that a new trial should be ordered with a view to the re-assessment of these damages.

As regards the $4,000 awarded for the libel in the plea, I should not feel disposed to disturb the verdict, and if my colleagues had been disposed to reduce the total verdict to $5,000, so as to give $1,000 for the newspaper libel, and $4,000 for the plea, I should not have entered a dissent.

BABY, J., expressed his concurrence in the remarks of the Hon. Mr. Justice Church.

Judgment confirmed.

Macmaster, Hutchinson, Weir & McLennan, attorneys for appellant.

Lafleur & Rielle, attorneys for respondent.

(E. L.)

September 22, 1874.

Coram MONK, TASCHEREAU, RAMSAY, SANBORN, JJ., LORANGER, J. *ad hoc.*

MICHEL GIRARD,
(*Plaintiff in Court below*),
APPELLANT;

AND

LOUIS BELANGER ET AL.,
(*Defendants in Court below*),
RESPONDENTS.

Action en dénonciation de nouvel œuvre — Statutory Privilege to maintain toll-bridge—Infringement.

A statutory privilege was accorded (by 26 Vict., c. 32) to a person, his heirs and assigns, to levy tolls on a toll-bridge erected by him over a river, and by the statute according such privilege, it was enacted (sect. 10) "that after the bridge shall be open for the use of the public, "no person shall erect or cause to be erected any bridge or bridges, "or maintain or cause to be maintained, any means of communica- "for the carriage of any person, cattle or carriage whatsoever, *for* "*hire*, across the said branch of the river Yamaska, at the place "above mentioned, anywhere within one mile above and one mile "and a half below the said bridge, under penalty, etc., provided that "nothing in this Act shall be construed to deprive the public of the "right of crossing the said river within the limits aforesaid, by ford- "ing, or in canoes or otherwise, without payment." A large number of persons built a subscription bridge within the limits of the statutory privilege, avowedly with the object of avoiding the use of the toll-bridge and depriving the owner of the benefit of his privilege.

HELD:—That this was an indirect mode of defeating the statutory privilege, and that the defendants should be condemned to demolish the bridge by them constructed.

The appeal was from a judgment rendered by the Superior Court, at St. Hyacinthe, Dec. 2, 1872, dismissing an action *en dénonciation de nouvel œuvre.*

The appellant, by his action, complained of an infringement of the privilege accorded to Hilaire Théberge by 26 Vict., c. 32, by which Théberge, his heirs and assigns, was authorized to levy tolls on the bridge constructed by

him over the south branch of the river Yamaska, and it was enacted that no new bridge should be erected within a certain distance for the carriage of any person, cattle or carriage for hire.

Before the return of the action, the plaintiff asked for a special order enjoining the defendants from proceeding with their works on the bridge which was in course of erection by them.

This petition was dismissed by SICOTTE, J., by the following judgment :—

"Attendu que le seul danger à craindre pour le demandeur dans les droits qu'il réclame ne peut être qu'une diminution dans ses péages, et qu'il a réclamé par son action même une indemnité pour ses dommages-intérêts ;

"Attendu qu'une condamnation, s'il y a eu lieu, pour les dommages-intérêts ne peut être longtemps retardée, ni le paiement d'icelle être en péril ;

"Attendu qu'il n'y a nul péril dans la demande et que tous les droits du demandeur sont et peuvent être complètement sauvegardés par les voies ordinaires, déclare le demandeur non recevable dans sa demande pour un interdit, et l'en déboute avec dépens."

The final judgment of the Superior Court, dismissing the action, was as follows :—

"La Cour, etc....

"Considérant que le demandeur comme étant aux droits du concessionnaire d'un droit de péages sur un pont construit sur la rivière Yamaska, navigable et flottable, réclame par la complainte en dénonciation de nouvel œuvre contre les défendeurs, parce que ces derniers ont commencé des travaux dans la même rivière, dans le but de construire et de faire construire un pont dans l'étendue des limites de la concession octroyée par l'Acte ch. 32, 26 Victoria, concluant à la destruction des travaux commencés et à une condamnation de $300 de dommages intérêts ;

"Considérant que la propriété et la possession du demandeur consistent seulement dans le droit de péages et les ouvrages qui constituent le pont même ;

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"Considérant que ces droits sont exclusifs et doivent être strictement limités dans les termes de l'octroi ;

"Considérant qu'aux termes de l'octroi la construction d'un autre pont est prévue et n'est toutefois réprimée que par l'amende, et seulement dans le cas où cette construction aurait été faite dans un but de gain ;

"Considérant que la construction commencée ne l'était pas dans tel but, mais pour obtenir une voie de communication libre de péages ;

"Considérant que le gain dont parle l'octroi est celui représenté par le péage exigé pour le passage ;

"Considérant que le demandeur n'a aucune propriété ni possession d'aucun droit réel dans et sur la rivière, et que, dans les circonstances, il n'avait pas droit d'exercer la complainte et dénonciation de nouvel œuvre ;

"Considérant que les travaux commencés par les défendeurs n'ont établi aucune voie de communication, qu'ils n'ont pas et n'ont même pu demander et recevoir des péages et faire gain à raison d'aucune voie de communication, et que le demandeur ne peut réclamer condamnation que pour dommages résultant d'un tort actuel, et non d'un tort futur ou possible ;

"Considérant qu'il n'a pas été constaté de tort et d'injure actuel et consommé par et contre les défendeurs ;

"Considérant que le demandeur n'a pas justifié sa demande et que les défendeurs ont justifié leurs défenses, déclare le demandeur mal fondé dans sa demande et complainte, le déboute de son action avec dépens." (1)

SANBORN, J. :—

This is a case of very great interest. The present appellant brought an action in the Superior Court at St. Hyacinthe against the respondents, five in number, who are the active members of a larger number who had formed a company and begun to build a bridge across a branch of the river Yamaska, in the district of St. Hyacinthe. The appellant claims that this is an infringe-

(1) The observations of the learned judge in rendering judgment will be found in 17 L. C. J. 263.

ment of his right under the provisions of a private statute, the tenth section of which reads as follows:—"After the "bridge shall be open for the use of the public, no per- "son shall erect, or cause to be erected, any bridge or brid- "ges, or maintain, or cause to be maintained, any means "of communication for the carriage of any person, cattle "or carriage whatsoever, for hire, across the said branch "of the river Yamaska, at the place above mentioned, "anywhere within one mile above and one mile and a "half below the said bridge, under penalty of a fine of "40s. cy., for each person, animal or carriage conveyed "across the said river on any bridge or means of commu- "nication, constructed and maintained for hire, provided "that nothing in this Act shall be construed to deprive "the public of crossing the said river within the limits "aforesaid, by fording, or in canoes or otherwise, without "payment." The action is *en dénonciation de nouvel œuvre.*

The respondents deny the right of action, and assert that as the bridge is not to be used for hire they have a right to build it for their own convenience. The judgment of the Court below sustained the respondents' pretension.

Under the common law, grants from the Crown are construed strictly: nothing is held to be conceded to individuals against the public that is not expressly stated. The reverse is the spirit of the civil law: a favorable construction is given to grants This is not very important here, however. Statutory franchises differ in some respects from royal grants. The former are contracts between the legislature and individuals by which, under certain conditions, rights are vested in the individual. The statute here shows that the appellant is to be held strictly to the conditions binding upon him. There is error in the judgment of the Court below when it proceeds upon the assertion that the appellant has no real right upon the river. The respondents have no right to build within the limit merely because they do not charge a toll. See *Leprohon* v. *Globensky*, 3 L. C. J. 310. There is also an English decision which supports this principle. We

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think the appellant is entitled to the remedy which he seeks, and the judgment will be reversed accordingly.

RAMSAY, J.:—

Two questions arise in this case: First, whether the building of this bridge is an infraction of appellant's right, or a *trouble*. Second, whether he has such an interest as to allow him to bring an action for the private nuisance.

The prohibition of the statute which constitutes appellant's right is in these words: (*statute cited*). Now what have respondents done? They banded themselves together to build a subscription bridge which should be free to them, and over which, it appears, they allow the public to cross free. The respondents say this is not building a bridge for lucre and profit, but for private convenience, and consequently it is not an infraction of plaintiff's privilege.

It is manifest the fact that the owners of the bridge let the public pass free over it, is neither here nor there in examining the question. If they have a right to put up this bridge they have a right to reserve the use for themselves. The naked question, then, is this: Can any number of people band themselves together, and effectually deprive a man of his privilege? There can be no doubt that a right of ferry does not preclude a man from crossing the stream in his own boat, or from carrying another across as a favour; but it does not follow that what one man can do without combination, two or more persons can combine to do in fraud of the rights of a third person. And so, in *Tripp* v. *Frank*, 4 T. R. 666, it was held that "a "boat may lawfully ply with passengers from one of the "termini of a ferry to a place without, however near to "the other, if done *bonâ fide*, and not to injure the ferry-"man's right."

Here the whole thing was intended to destroy the bridge-owner's right. The law does not permit gossamer tissues of legality to bar the road to justice, and Courts must see that fraud is not concealed under a thin veil of legal form.

MONK, J.:—

The respondents say that their bridge is not an infringement of the charter of appellant, and that it is premature to complain of it before any one has crossed. But there is no doubt that the bridge was built for some purpose. The Court is of opinion that the bridge which these gentlemen had in hand when the action was instituted was built for the purpose of violating the appellant's franchise. We order the bridge to be demolished, and we condemn the respondents to pay $100 damages, though damage is not clearly proved. In reality, the bridge was not built at the time this action was commenced. There was an application for an injunction to prevent the respondents from proceeding with the work, but the petition was rejected.

The judgment is as follows:—

" The Court, etc.. ...

" Considering that by the statute of the late Province of Canada, passed in the 26th year of Her Majesty's reign, chap. 32, the right and franchise was granted to and vested in one Hilaire Théberge, his heirs and assigns, in a certain bridge erected by him on a branch of the River Yamaska, in the village of St. Pie, in the district of St. Hyacinthe, with a right to erect a toll-house and toll-gate and other dependencies thereto, including ascents and approaches thereto, with the privilege of asking and receiving tolls at the rates specified in said Act, of passage over said bridge, upon condition of his keeping and maintaining said bridge in good repair so as to afford safe and convenient passage for travellers, cattle and vehicles, and upon his conforming generally to the requirements of said Act;

"And considering that by said Act it was enacted 'that after said bridge should be open for the public, no person should erect or cause to be erected, any bridge or bridges, or maintain or cause to be maintained, any means of communication for the carriage of any person, cattle or carriage whatsoever for hire, across the said branch of the River Yamaska, at the place above mentioned, anywhere within one mile above and one mile and a half below the

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said bridge, under a penalty of a fine of forty shillings, currency, for each person, animal or carriage conveyed across the said river on any bridge, or means of communication constructed and maintained for hire, provided nothing in said Act should be construed to deprive the public of the right of crossing the said river, within the limits aforesaid, by fording or in canoes, or otherwise without payment';

"And considering that by virtue of said Act the said Hilaire Théberge, his heirs and assigns, was secured the exclusive right and privilege of keeping a bridge for the passage of travellers, cattle and vehicles for hire, over said branch of the River Yamaska, at said village of St. Pie, and for over one mile above and a mile and a half below said bridge, so long as he or his heirs or assigns conformed to the requirements of said Act, and until said bridge should be assumed by Her Majesty in conformity with the provisions of said Act;

"And considering that it is proved that appellant hath acquired the rights and privileges and franchise of said Hilaire Théberge pertaining to said bridge and its appurtenances, and that it hath been kept up, and still is kept up, and maintained according to the provisions of said Act;

"And considering that at the time of the institution of this action, and prior thereto, the respondents had by means of contributions provided by themselves and a large number of persons interested in the passage of travellers, cattle and vehicles across said branch of said River Yamaska, at and near said village of St. Pie, commenced to construct a bridge across said branch of said River Yamaska, within the limits of the privilege of said appellant, to wit, within one mile above the bridge erected by said Hilaire Théberge, between the property of William Bradford on one side, and Pierre Euclide Roy on the other side, and have proceeded, against the protestations of appellant, to complete said bridge for the passage of travellers, cattle and vehicles, to the injury of said appellant and the disparagement of his privilege and franchise aforesaid;

"And considering that said respondents, acting for themselves and said contributors, in so erecting said bridge, have so distributed the burdens upon the persons requiring to use the bridge, so erected by them, as to secure to a large number of the inhabitants of the locality communication across said branch of said river Yamaska within limits of appellant's franchise, by payment of money as a substitute for tolls, and therefore it is an attempted evasion of direct payment of tolls and a violation of appellant's right of property secured by said Act;

"And considering that at the time of the institution of this action, appellant had good reason to apprehend that respondents intended to erect their said bridge aforesaid to the disparagement and destruction, or partial destruction, of the emoluments secured to him by his said franchise, and had already begun to erect their said bridge, which they have since actually made and applied for the passage of travellers, cattle and vehicles, and had right to the action in this behalf to cause respondents to desist from their work in the erection of said bridge, and had and now has a right to the demolition of the said bridge so begun and now actually built;

"And, therefore, considering that there is error in the judgment rendered in this cause in the Superior Court, in the district of St. Hyacinthe, on the 2nd of December, 1872, and now appealed against, doth reverse the same; and proceeding to render the judgment which the Court below ought to have rendered, doth adjudge and declare the said appellant, Michel Girard, to have the exclusive right and privilege to have, keep and maintain a bridge for the passage of travellers, cattle and vehicles across the branch of the said river Yamaska at the said village of St. Pie, subject to and in conformity with the provisions of the statute of the late province of Canada, 26 Victoria, ch. 32, at the place where the said bridge, erected by said Hilaire Théberge, was placed when said Act was passed, and the bridge of the said Michel Girard now is; and doth dismiss the exceptions pleaded by said respondents in this cause, and doth maintain him, said Michel Girard,

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in the possession and enjoyment of his said right pertaining to said bridge and its appurtenances, and doth enjoin upon said defendants henceforth to cease from troubling and disturbing said appellant, Michel Girard, in the enjoyment of his said rights, privileges and franchise pertaining to his said bridge and its appurtenances, and to desist from all works begun by them in the erection of a bridge for the purpose of travellers, cattle and vehicles within the limits of appellant's said franchise on said branch of said river Yamaska; and doth adjudge and condemn the said defendants in the Court below (the respondents herein) jointly and severally, within fifteen days after the service of a copy of this judgment upon them, to remove, abate and demolish the works, materials and bridge so as aforesaid begun and placed and erected upon said branch of said river Yamaska within one mile above the said bridge of said appellant, Michel Girard, in the village of St. Pie, in the district of St. Hyacinthe, between the property of William Bradford, on one side, and Pierre Euclide Roy on the other side; and in default of their so doing, that said works, materials and bridge so placed, erected and built by respondents at the place last mentioned, be abated, demolished and removed by the sheriff of the district of St. Hyacinthe, at the cost and expense of said respondents jointly and severally; and further, the Court now here doth adjudge and condemn the said respondents, jointly and severally, to pay said appellant for his damages occasioned by their illegal acts aforesaid, the sum of $100 current money of Canada, with costs incurred by him, said appellant, as well in the Court below as in this Court."

Judgment reversed.(1)

Papineau & Morrison, attorneys for appellant.

Dorion, Dorion & Geoffrion, attorneys for respondents.

(J. K.)

(1) Leave to appeal to the Privy Council was obtained, but security was not given.

February 25, 1888.

Coram DORION, C. J., CROSS, BABY, CHURCH, JJ.

ANNIE ELIZABETH MYLER ET VIR,

(*Plaintiffs in Court below*),

APPELLANTS;

AND

THOMAS STYLES,

(*Defendant in Court below*),

RESPONDENT.

Lease—Occupation of shed not mentioned in the Lease—Accessory—Acquiescence.

HELD:—Where the lessee leased buildings in course of construction, and, on taking possession of the same, also occupied and used, without objection on the part of the lessor, during nearly four years, a small shed in the rear of the leased premises: that the shed, though not mentioned in the lease, nor shown on the architect's plans of the buildings, must be considered as an accessory of the premises leased, and that the lessor, by acquiescing in the lessee's occupation for so long a period, without claiming rent, had placed that construction upon the contract.

The appeal was from the following judgment of the Superior Court, Montreal, (CIMON, J.), Feb. 27, 1886:—

"La Cour, etc.....

"Considérant que par le bail du 17 septembre 1880, la demanderesse a loué au défendeur un hôtel à trois étages alors en voie de construction, avec une aile en brique de trois étages à être construite au dit hôtel, le dit défendeur devant avoir, pendant la durée du dit bail qui était de neuf années, la jouissance d'une certaine partie de la cour en arrière du dit hôtel, laquelle partie devait être déterminée par la demanderesse, avec droit au défendeur ensuite d'enclore cette partie de la cour;

"Considérant que le défendeur a pris possession en 1881 des prémisses ainsi louées, et que de suite il s'est servi du wood-shed (qui était ouvert et se trouvait dans

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la cour vis-à-vis ses prémisses) comme faisant partie de ce qui lui avait été loué, et ce, au vu et sçu et du consentement apparent de la demanderesse, et que celle-ci, en laissant écouler quatre ans sans se plaindre et sans diviser sa cour et laissant le défendeur jouir de la portion de la cour couverte par ce wood-shed et du wood-shed lui-même, a par là tacitement consenti à l'interprétation donnée au dit bail par le défendeur, et que la demanderesse, n'ayant pas autrement déterminé la portion de la cour dont le défendeur devait jouir, et ayant laissé le défendeur jouir ainsi de la partie de la cour sans rien dire pendant aussi longtemps, est maintenant mal fondée dans son action ;

" Considérant que les demandeurs n'ont pas prouvé que le défendeur eût des effets appartenant à la demanderesse ;

" Maintient les plaidoyer et défense du défendeur et renvoie l'action des demandeurs avec dépens distraits, etc."

Jan. 16, 1888.]

L. O. David, for the appellant.

J. J. Curran, Q. C., for the respondent.

CROSS, J. (for the Court):—

By lease executed 7th September, 1880, the appellant, Annie E. Myler, then a widow, leased to the respondent, Thomas Styles, for a period of nine years, certain buildings, then in course of construction, intended for the keeping of a hotel, consisting of a main building and wing or extension, together with the use of a certain portion of the yard in rear, to be determined by the lessor, with right by the lessee to fence the same at his option.

Styles, without complaint or objection, occupied the small shed in rear of the yard as an appurtenance of the property leased, up to the 15th December, 1884, when the appellant, Annie E. Myler, with her husband, James Main, whom she had married in the interval, served a protest on Styles, claiming that he had occupied the small shed without her consent, it not having been included in the lease, and demanding rent for the same at the rate of $60 per annum, making for three years and eight months

of occupation $220, for which they brought suit against Styles.

Styles pleaded that he had taken possession of the shed and occupied it under his lease with the knowledge and sanction of the lessor as an appurtenance of the premises leased. It had never been intended at the time of the lease, nor for the several years he had occupied it, that rent should be paid for it; on the contrary, although not specially mentioned in the lease, it was by intendment included, and the lease had been so interpreted by the tacit acquiescence of both parties.

To this plea Dame Annie E. Myler and her husband replied that these allegations of Styles were untrue, that they had furnished him accounts and tried to collect the rent of the shed from him, but had failed.

It thus becomes a question of proof as to the acquiescence in Styles' occupation of the shed as part of the property leased, and the practical interpretation that the parties themselves gave to the instrument as to whether the shed was treated as an appurtenance to the lease.

The proof shows that Styles had the undisputed occupation of the shed in question for about four years from the date of the lease, with the full knowledge of Annie Elizabeth Styles, afterwards Mrs. Main, who even boarded with him a small part of the time. Although not mentioned in the lease, nor shown on the architect's plans of the buildings, it may fairly be presumed to have been viewed as a mere convenience, an accessory appurtenant to the premises leased, for use in connection therewith, which presumption is strengthened to a conviction from the fact that both parties must have so interpreted the lease from acquiescence of Styles' occupation of the shed for such a length of time. It was a very inconsiderable structure of trifling value, probably considered not worth mention, or unnecessary to be mentioned. It is true that an attempt has been made to show that rent was claimed for it at an early period. I put no faith in the evidence by which this is attempted to be established. The conclusion arrived at is that the judgment of the Superior Court,

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which dismissed the action, should be sustained; it is consequently confirmed.

Judgment confirmed.

Longpré & David, attorneys for appellant.
Curran & Grenier, attorneys for respondent.
(J. K.)

February 25, 1888.

Coram DORION, C. J., CROSS, BABY, CHURCH, JJ.

ANNIE ELIZABETH MYLER ET VIR,

(*Defendants in Court below*),

APPELLANTS;

AND

THOMAS STYLES,

(*Plaintiff in Court below*),

RESPONDENT.

Procedure—Putting husband of defendant in the cause—Lease, Construction of.

HELD:—1. Where the plaintiff was ordered, by a judgment of the Court, to bring the husband of the female defendant personally into the cause, that the service of a new writ and declaration setting forth the demand in full, upon both husband and wife, was sufficient.

2. That where the lease stipulated that the lessee should have the use of a portion of the yard in rear of the building leased, which portion should be determined by the lessor, with right to the lessee to fence the same at his option, that the lessor was not entitled, after the lessee had been four years in possession with the yard open, to erect a fence across the yard, more especially as the fence deprived the lessee of light and air.

The appeal was from an interlocutory judgment of the Superior Court, Montreal, (CARON, J.) Feb. 10, 1886, dismissing an exception to the form, and also from the final

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judgment (MATHIEU, J.) Sept. 22, 1886, which was as follows:—

"La cour, etc.....

"Considérant qu'avant la construction des bâtisses actuellement occupées par le demandeur et par la défenderesse, il y avait, à la connaissance du demandeur au même endroit, deux hôtels où l'on débitait des liqueurs énivrantes;

"Considérant que les dites bâtisses, par leur grandeur et leur apparence ainsi que par leur situation, sont évidemment destinées à des hôtels ou à des maisons de pension, et que le demandeur a vu les plans de leur construction avant qu'elles fussent érigées, et les a vu construire;

"Considérant que la maison occupée par la défenderesse a été exploitée comme hôtel pendant plusieurs années avant que le demandeur en cette cause ait songé à s'en plaindre, et que par son silence il a lui-même tacitement consenti à cette exploitation;

"Considérant que le demandeur a toujours été en possession de la remise érigée à la profondeur du terrain où sont construites les dites bâtisses, et que la défenderesse s'est illégalement emparée de ce terrain et de cette remise, en érigeant une clôture séparant la cour, de manière à exclure le demandeur de tout accès à la dite remise;

"A ordonné et ordonne aux dits défendeurs de démolir, sous 15 jours de la signification du présent jugement, la clôture ainsi érigée à travers la dite cour, de manière à donner un libre accès au demandeur à la dite remise, et à laisser jouir le dit demandeur de la dite remise comme il en a le droit en vertu de son bail, et faute par les défendeurs de démolir la dite clôture dans le dit délai, cette clôture sera démolie sous l'autorité de cette cour et le demandeur mis en possession de la dite remise:

"Considérant que le dit demandeur n'a droit à aucun dommage, et qu'il n'en a prouvé aucun pour les causes énoncées dans sa déclaration;

"A maintenu et maintient l'action comme susdit quant à la dite clôture et à la dite remise, et a renvoyé et renvoie cette action quant au surplus de la demande, chaque partie payant ses frais."

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On the question of procedure, the appellants submitted the following argument:—

Après les interlocutoires (*vide* 11 Leg. News, 354) il s'agissait, pour le demandeur, de mettre le défendeur en cause, comme chef de la communauté, pour voir accorder contre lui personnellement les conclusions que le demandeur requérait dans son action contre la défenderesse seule.

Il s'agissait donc d'une nouvelle assignation, mais contre le défendeur seul et non contre la défenderesse qui était déjà assignée et contre laquelle des conclusions étaient déjà prises.

Les assignations en mise en cause d'un tiers ne sont pas nouvelles dans notre procédure, ni en France, du reste: elles ne consistent pas à annuler les conclusions déjà prises contre les parties régulièrement assignées et à renouveler ces conclusions contre elles dans l'action en mise en cause; elles consistent à prendre contre le tiers des conclusions contre lui et contre lui seul. Les conclusions prises contre les parties originairement assignées, suivent leur cours naturel.

Mais le demandeur, au lieu de suivre ces dictées de la logique et de la loi, fit émettre un nouveau bref d'assignation, non contre le défendeur seul, mais contre la défenderesse pareillement, fit signifier ce bref et au défendeur et à la defenderesse, et assigna cette dernière, qui avait déjà été assignée, et qui était dans la cause depuis longtemps, à comparaître de nouveau le 12 janvier 1886. Pourquoi? Pour répondre aux mêmes allégations et aux mêmes conclusions auxquelles, par le premier bref, elle avait déjà été assignée à répondre le 5 juin 1885.

Mais, dira l'intimé, le nouveau bref et la nouvelle déclaration étaient un amendement du premier bref et de la première déclaration. Nous répondons que l'intimé n'a jamais demandé la permission d'amender le premier bref et la première déclaration *quoad* la défenderesse. Il a demandé la permission de les amender *quoad* le défendeur et cette permission lui a été refusée. L'intimé ne pouvait pas amender son bref et sa déclaration sans le consentement

de ses adversaires ou sans la permission du tribunal. Or ce consentement ne lui a jamais été donné, et tout ce que le tribunal lui a permis, c'était *de mettre en cause le défendeur seul.*

Concluons donc que la procédure de l'intimé était tout à fait irrégulière et illégale et que l'exception à la forme que les appelants ont opposée à cette nouvelle assignation, au lieu d'être rejetée par le jugement interlocutoire dont ils appellent aujourd'hui, aurait dû être maintenue.

Nous demandons en conséquence que l'appel soit maintenu sur ce point, que l'interlocutoire rejetant cette exception à la forme soit cassé, que l'exception soit maintenue et que les intimés soient déboutés de leur dite assignation et action avec dépens.

Feb. 25, 1888.]

CROSS, J. (for the Court) :—

The present action was instituted by the respondent Styles against the appellant Ann Elizabeth Myler and against her husband James Main, for the purpose of authorizing his wife, in which Styles claimed, first : That Mrs. Main, having leased to him premises in which to carry on the business of hotel-keeping, had no right herself to use the adjoining premises as she was doing for the like purpose of hotel-keeping; 2nd, that on the 17th September, 1880, Mrs. Main, then a widow, had leased to him, Styles, for a period of nine years, certain buildings then in course of construction intended for the keeping of a hotel, consisting of a main building and wing or extension, together with the use of a certain portion of the yard in rear of said building which should be determined by the lessor, with right by the lessee to fence the same at his option ; that in virtue of the lease he, Styles, had entered into possession and enjoyed the use of a suitable and necessary portion of the yard, together with a small wood-shed in rear, a necessary appurtenance to the premises, all of which he continued to enjoy with the knowledge, acquiescence and approbation of the lessor; that the hotel kitchens were in the wing and a door open-

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ing from said kitchens into the yard, was a necessity for access for air and light and for communication with said shed, all of which he had enjoyed up to about the 15th December, 1884, when the said Ann Elizabeth Myler began to trouble his enjoyment, and about the 23rd of May, 1885, she invaded the rights of him, the said Styles, under said lease, more particularly by opening a communication with the neighboring premises through a fence theretofore existing, which separated the properties, by ejecting from said wood-shed effects of Styles stored therein, by taking possession of the portion of the yard theretofore enjoyed by him Styles, by erecting a fence a few steps from his door and windows, in such manner as to deprive him of the use of that portion of the yard necessary for his enjoyment of the premises, and depriving him of light and air, for which reason he claimed that the said Anne Elizabeth Myler should be ordered to close the opening in the fence, demolish the fence she had so erected, and pay the damages caused by her to Styles.

This action was met by an exception *à la forme* setting up the pretension that as James Main had only been summoned to authorize his wife, and should have been summoned and put into the cause as head of the community resulting from his marriage with said Ann Elizabeth Myler, Styles could not proceed with his action until he was so called into the case to answer in his own right. This exception was maintained, whereupon Styles' counsel moved that his writ and declaration be amended by adding "as well personally" to the qualification of James Main. This application was refused, Styles being thereupon obliged to issue a new writ to call in Main to answer as well for himself as to authorize his wife. This again was met by a further exception *à la forme*, because the second proceeding contained a full demand against the husband and wife without asking that the first writ and declaration should be amended. This second exception *à la forme* was dismissed. The present appeal attacks this judgment as well as the judgment on the merits. The case being so far advanced, the parties proceeded to evidence on the merits.

As the first ground of action which complained of A.E. Myler carrying on the business of hotel-keeping, was ruled against the plaintiff Styles, and he has not complained, no further reference need be made to that part of the case.

The second cause of action remains for discussion.

It is quite true that the lease put much in the power of the lessor to determine what part of the yard should be assigned for use to Styles, but at all events it would have to be a reasonable part suitable for the business of Styles, and not a mere arbitrary allotment which would destroy or seriously impair the usefulness of the premises for the purposes for which they were leased to Styles, and the division could not be made without some intimation, notice, and pointing out of the same to Styles; and above all, Myler and her husband had no right to divide the yard by a fence. The fence was only to be made by and at the option of Styles, who, if even but a small part of the yard had been assigned to him, and he obliged to content himself with it, might still object to a fence as calculated to shut out the light and air which it was desirable for him to have; and more, he had been allowed to enjoy the open yard and the shed as an appurtenance to the premises he had leased, such enjoyment being in open view of the lessor, for a period of four years, which was an acquiescence in an interpretation of the lease, which gave it to him as a right. It was too late for the lessor to interfere with that enjoyment, or to give a more strict interpretation of the lease, and no fault can be found with the construction to this effect applied to the case by the judgment appealed from.

As to the second exception *à la forme*, we hold that it was properly dismissed. The appellants had nothing to complain of. If the complaint was fully set forth in the second writ and declaration, it could not prejudice the parties who had to plead to it. They were fully informed of the demand and its causes, and were fairly bound to answer it on the merits. We therefore think that Styles made out his case to the full extent to which the judgment went

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in his favor in the Court below, viz., ordering the fence, placed in the yard by Myler and her husband, to be demolished. We therefore conclude to confirm the judgment appealed from, and it is confirmed accordingly.

Judgment confirmed.

Longpré & David, for the appellant.

Curran & Grenier, for the respondents.

(J. K.)

March 27, 1886.

Coram DORION, C.J., MONK, TESSIER, CROSS, BABY, JJ.

FRANÇOIS-XAVIER ARCHAMBAULT,

(*Plaintiff in Court below*),

APPELLANT;

AND

THE GREAT NORTH WESTERN TELEGRAPH CO.,

(*Defendant in Court below*),

RESPONDENT.

AND A CROSS APPEAL.

Libel—Telegraph Company—Transmission of libellous matter—Publication of judicial proceedings—Damages.

HELD:—1. That the publication of an extract from the declaration of a party in a suit entered, but before the return of the action, is not privileged.

2. That the communication by a telegraph company of a dispatch to its employees engaged in transmitting and receiving such dispatch, is a publication.

3. That a telegraph company is not bound to transmit a dispatch of a libellous character, and is not entitled to plead its statutory obligation to transmit the dispatches entrusted to it, in answer to an action of libel for the transmission of a libellous dispatch.

4. That the refusal of the defendant to disclose the name of the person at whose request the libellous matter was transmitted, was an aggravation of the wrong, and substantial damages should be awarded.

Appeals were taken by both plaintiff and defendant from a judgment of the Superior Court, Montreal (PAPINEAU, J.),

April 10, 1884. The *considérants* of the judgment were adopted and embodied in the judgment of the Court of Appeal, the judgment being reformed only as to the amount of damages awarded, which was increased from $50 to $500; and the cross-appeal was dismissed.

January 26, 27, 1886.]

F. X. Archambault, Q. C., for the appellant:—

Les questions qui se présentent dans cette cause peuvent se résumer dans les suivantes:

1o. L'intimée a-t-elle prouvé les allégués de sa défense, notamment que cette dépêche était un extrait de la déclaration dans la cause de Smythe v. Archambault, laquelle, prétend-elle, était produite en cour et conséquemment du domaine public?

2o. L'intimée avait-elle le droit et était-elle tenue d'expédier et distribuer, comme elle l'a fait aux journaux, la dépêche en question?

3o. En le faisant et en refusant de faire connaître le nom de l'auteur de la dépêche, en a-t-elle assumé la responsabilité et les conséquences?

4o. L'appelant a-t-il prouvé les allégués de son action, a-t-il souffert des dommages, et était-il tenu d'en prouver le *quantum*, ou des dommages spéciaux ou spécifiques?

Nous allons essayer de répondre à ces questions aussi brièvement que possible et de démontrer que l'intimée a tort sur tous les points.

En réponse à la première question, nous nous croyons autorisés à dire que l'intimée a complètement failli sur ce point. En effet, il est établi par le témoin Kernick, député protonotaire, que cette dépêche n'a pas pu être extraite de la déclaration dans la cause Smythe, puisque l'action n'a été instituée que la veille de la publication de la dépêche elle-même dans les journaux le 27 février 1883; puisque cette action n'était rapportable et n'a de fait été rapportée que le 14 de mars suivant, et puisque par courtoisie pour l'appelant, membre de la profession, on n'avait pas entré son nom dans le livre d'entrée des brefs de sommation. L'intimé a donc failli sur ce moyen et est non recevable à l'invoquer. La déclaration n'était

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pas devant la cour, et par conséquent n'était pas du domaine public.

Venons-en, sans en dire trop long sur ce sujet, à la deuxième question.

Nous aimerions à savoir en vertu de quels principes une compagnie de télégraphe a le droit, et qui plus est, serait tenue de se faire le complice du premier voyou qui va se présenter à elle avec une dépêche contenant un libelle qui constitue un délit, une violation de nos lois, et irait non-seulement recevoir cette dépêche, mais l'expédier et la distribuer comme dans l'espèce. L'intimée a failli de démontrer l'admissibilité d'une pareille proposition et faillira toujours de le faire. Comme compagnie de télégraphe, l'intimée se trouve dans la position de l'éditeur d'un journal, du publiciste (publisher), et n'a pas plus qu'eux le droit d'écrire et de publier des libelles au détriment des citoyens. Sa charte peut bien l'obliger de transmettre les dépêches privées aux particuliers à qui elles sont adressées, mais ne peut certainement pas la forcer de commettre des délits déclarés tels par la loi et de se faire distributeur de ces libelles qui constituent le délit. Le bon sens est là qui s'impose, et cela ne soutient pas la discussion. Non, par son fait, l'intimée a fait un tort grave à l'appelant, et en loi elle est tenue de réparer ce tort ou ce préjudice. Ainsi, du reste, l'a décidé le jugement de première instance.

Mais fût-elle obligée ou jusqu'à un certain point de bonne foi, en publiant cette dépêche, ne devait-elle pas divulguer le nom de l'auteur, lorsque le fait dommageable lui était dénoncé et que le nom du coupable lui était demandé? Evidemment oui, et en ne le faisant pas elle se faisait le complice de celui-ci et assumait la responsabilité de son acte. Ceci répond à la troisième question.

Quant à la quatrième, il est facile de la résoudre, car, comme l'atteste du reste le jugement de première instance, l'appelant a prouvé tous les allégués de sa déclaration. Il a prouvé que cela l'avait terriblement blessé dans son amour propre, sa sensibilité, et qu'il en avait pleuré. Il a prouvé que ce fait avait été de nature à lui nuire

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dans sa réputation de citoyen et d'avocat. La preuve est on ne peut plus complète et plus forte, et nous soumettons qu'en pareille matière, la partie qui souffre n'est pas tenue de prouver des dommages spécifiques. Le juge dans ces cas remplace le jury et détermine le montant des dommages. Il se suppose à la place de la personne visée par le délit, prend en considération son caractère, sa position sociale et son rang et accorde les dommages en conséquence. C'est ce que n'a pas fait l'honorable juge dans l'espèce, mais nous sommes convaincus que la Cour suppléera ou comblera cette lacune et accordera à l'appelant comme il le demande par son présent appel, des dommages considérables et exemplaires, tout en confirmant quant aux principes le jugement de la Cour Supérieure.

H. Abbott, for the appellants in the cross-appeal :—

The appellants contend that the evidence has clearly established their position. It is proved that they received this telegram from a third party, the Associated Press, acting through its agent, Mr. Wallace. They transmitted it to the Associated Press at Quebec and other points; they could not exercise discretion in the matter or control the telegram in any way. It was for the Press Association, and the newspapers who were members of it, to use their discretion as to the publication of the matter contained in the despatch. The Company were the mere medium through which it was transmitted, by means of their telegraphic line, from one member of the Associated Press to another. They were, in fact, the machinery used by the Associated Press. The matter sent through them remained private and secret so far as they were concerned. They divulged it to no one, and made it public in no way. The Company and its directors and manager were absolutely ignorant of the contents of the message; in fact, it was not known to any of their employees, except the operators transmitting and receiving the same; who, of course, only acted mechanically in so doing. The appellants were bound by the statutes affecting telegraph com-

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panies (C. S. C., cap. 87, s. 16), to transmit all messages in the order received, under a penalty. The respondent contends that this legal obligation does not compel or authorize the company to transmit libellous or defamatory matter over its lines. This may seem at a first glance somewhat plausible, but examination will show that not only is it unfounded, but entirely impracticable. The company appellants are bound by statute under a penalty to transmit all messages in the order received, and, under the common law, with all convenient despatch. On the other hand, says the respondent, the company are liable in damages if they transmit any libellous or defamatory matter. Therefore, the company must guard itself against both of these contingencies. They must, in the first place, examine every telegram carefully, to see that it does not contain libellous or defamatory matter. This would entail having a skilled and intelligent officer, to act as a censor, at every office of the company throughout the country at large. This man would not only have to be skilled and intelligent, but also learned in the law, so as to distinguish whether matter was really libellous or not. For if he refused a telegram on the ground that it was libellous, the company could be made subject to the penalty for refusing to send it, should it turn out that the officer was mistaken. In the meantime, the delay in examining the different telegrams would naturally expose the company to the danger of their being prosecuted for the penalty, for not transmitting in the order received; or to being sued in damages for the delay thus caused.

The judgment in the Court below says that it is admitted by the appellants, and otherwise proved, that the company received and published, by transmitting to the members of the Associated Press, the libel in question. Now it is certainly neither admitted nor proved that the company appellants published the matter in question, unless it can be considered that the delivery of the telegram to the members of the Associated Press is a publication; and this, the appellants submit, is not a publication, within the meaning of the law, for which they can in

any way be held liable. The telegram was not originated nor sent by them, but by the agent of the Associated Press, and was published by its members and not by the appellants. As well might a postman, who carries and delivers a post card, be held liable for libellous matter contained in it, as the Telegraph Company for that contained in the telegrams they transmit. Both are equally acting within their legal rights, and carrying out a duty imposed upon them by law.

The judgment further says that the appellants published the libel as many times as it was communicated to their employees, who read it, and transmitted it to the Associated Press at Toronto, Ottawa and Quebec. How can it be considered a publication to the employees of the company, when they are sworn to secrecy, and liable to fine and imprisonment if they divulge the contents of any message? (*Vide* C. S. C., cap. 67, sec. 16). If this is to be considered a publication, it is quite clear that the business of telegraphy could not be carried on at all. It is notorious that matters affecting vitally both personal and commercial interests are daily and hourly transmitted by the telegraph; and if such transmission is to constitute a publication, the companies would be subject to actions for libel every day.

One of the considerations of the judgment also is, that the company appellants refused to make known to the plaintiff the author of the libel before the institution of the present suit. The appellants are unaware of any principle of law by which this fact would make them responsible for the publication of the libel by the press. But it seems to have been so considered by the learned judge, who has apparently adopted the theory of the respondent, that the refusal of the company appellants to disclose the name of the author of the despatch was an assumption of responsibility for its contents. It has already been pointed out that it is contrary to law, and against the rules and regulations of the company appellants, to disclose the names of the senders of despatches without an order from Court; and this is certainly a most

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proper arrangement, and devised for the protection, and in the interest, of the public generally. The appellants therefore respectfully submit that their manager was but acting within his rights, and in accordance with his duty, in refusing to give the name of the author of the despatch as he did; and that no responsibility attaches to them by reason of such refusal.

The second question which arises upon this appeal, is the question as to the privileged nature of the matter contained in this despatch. The Court will observe at once that it is merely a statement that an action of such and such a nature has been instituted against the respondent. And it may be a question as to whether there is anything libellous in the mere announcement of such a fact. But leaving that aside for the moment, we have to consider the question of privilege. It must be remembered that this action had been instituted, and entered in the entry book of summons in the Prothonotary's office, previous to the sending of the despatch in question. The matter itself of the despatch is a fair and uncolored abstract of the declaration in the case. The entry book of summons is a public register, kept in accordance with the rules of practice of the Superior Court. It is true that in this particular case the name of the defendant (the present respondent,) was from motives of delicacy, suppressed in the entry book of summons; but that would not deprive anyone of the right of knowing who the defendant in the case was; and this of course could be easily ascertained from the *fiat*, or the clerk in charge of the book. The law was also not complied with in not mentioning the cause of action in the entry book; but surely if the law provides that the cause of action shall be mentioned in this public register, there cannot be any liability attaching to the publication of the real cause of action, even though the law has not been complied with by its omission from the register.

The learned judge in the Court below has made it one of the considerations of his judgment that the respondent had failed to prove that the declaration in the suit in

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question formed part of the archives of the Court, and was open to the public. But the appellants submit that, so far as the legal question is concerned, it can make no difference whether the causes of action were as a matter of fact entered in the public register, so long as the law provides that they should be. The person who published is merely carrying out the intention of the law that the cause of actions before the Superior Court should be publicly known. Moreover, it can very little affect the question whether the declaration had been actually filed at the moment that the despatch was sent, provided that it afterwards was duly filed and formed part of the records of the Court. The fact reported by the telegraph was that the action had been taken, and this was true; and it was a fact publicly known; and a fact which the law permitted, and in fact ordered, should be publicly known. And the defendants submit, as a proposition of law, that the publication of such matters is privileged, and cannot form the basis of an action at law by the party pretending to be aggrieved by the publication (*Fleming* v. *Newton*, I House of Lords cases, 363; *Cosgrave* v. *Trade Auxiliary Company*, 8 Irish reports, C. L. 349. Odgers, 243-50. Specially, *Usill* v. *Hales*, p. 247. Flood, 189-92).

In any event the appellants contend that the sending of the message in question, merely stating that such a suit had been taken, was not a libel upon the respondent; and that no damage could be caused to the respondent by the publication of these facts. How can it be a libel to publish that which the law says shall be made public? The public have an interest to know, and the law gives them the right to know, who is being sued before the Courts. And how much stronger is their right, and how much greater their interest, when it is one of the public's own representatives in a popular assembly who is sued? It would be no information to say that an action has been taken against so-and-so; the cause of the action must be known; and the law has provided that it shall be known. Therefore, the publication of the fact that this action had been taken, and the causes on which it

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was based, was merely giving a larger measure of publicity to facts which the law allows to be made public. If the statements in the declaration in the suit in question were true, they were certainly of a nature to injure the plaintiff in his reputation and character. But the publication of the mere fact that the action had been entered, surely would not in itself be productive of such a result, and in any case would be a necessary consequence which he was, in the nature of things, bound to suffer. Moreover, as has been pointed out, the fact of this action having been instituted was publicly known by its entry in the Court House books, and by its publication in the city newspapers some time previous.

Upon the whole, the appellants respectfully contend that the judgment of the Court below was not well founded and should be reversed, for the following reasons chiefly:

(1). Because they received the message in question in the course of their ordinary business from a third party, and transmitted the same, as they were bound to do by law and by their charter, and had no option but to do so.

(2). Because the appellants were by law compelled to receive and transmit the message in question along with other telegraphic matter in order as received, subject to a penalty in default of so doing.

(3). Because the appellants in so doing were acting within their legal rights, and in the performance of a duty imposed upon them by law, and in good faith without malice.

(4). Because the appellants merely furnished the medium through which the despatch in question flowed, and did not publish or make publicly known the same, which remained secret and private while under their control.

(5). Because the matter in question was merely an extract from a public register authorized and ordered by law to be kept open to the public, and moreover formed a fair and uncolored extract from a public record, and was privileged by law.

(6). Because the sending of the said message did not constitute a libel against the respondent, and was not of a nature to cause him loss, damage or injury.

DORION, C. J.:—

This is an action under special circumstances, and quite novel; very little is to be found in the books which applies to it. A newspaper correspondent gave information to the telegraph company that an action was about to be instituted against Mr. Archambault, a member of Parliament and a Queen's Counsel. The statement, which was libellous on its face, was transmitted by the telegraph company to the associated press. Mr. Archambault applied for the name of the person who furnished the information, and the company refused to give it. Mr. Archambault then brought his action against the company, and got $50 damages. The company have appealed on the ground that they have done nothing wrong; that they are obliged to transmit every telegram brought to them, and that they are bound to secrecy by the terms of the law itself. Mr. Archambault also appeals, on the ground that the damages are not sufficient.

As to the pretension that the company are bound to send over their lines every message brought to them, I must express my decided dissent from such a proposition. Does the law mean that if a man wishes to commit a criminal offence through the instrumentality of a telegraph line—if he wishes to order somebody to commit a murder, for instance—that the company are bound to lend their assistance by transmitting his message? Surely not. And if a person wishes to telegraph that some one has robbed his neighbours, is the company bound to send such a message? I can understand that a company may not be liable for sending an injurious despatch in certain cases,—for example, a libel written in cypher; but that is not the case here. They have lent the aid of their lines to circulate a statement which on the face of it is injurious to a respectable citizen. Recently, the question came up whether a newsvendor who merely

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sold a newspaper, was liable for publishing libellous matter contained in it, and it was held that if he knew there was a libel in the paper when he sold it, he was responsible. Here an operator in the service of the company read the message at one end of the line, and it was received and read by operators elsewhere on the line. The defendants could not be ignorant that the statement was injurious. They have published it just as a newsvendor publishes a libel which is contained in a paper which he sells.

Again, it is pretended that it was a confidential communication. But it was open to all the employees engaged in transmitting and receiving it, and any one who could understand the tick of the telegraph might know what was passing. The law of England as to confidential communications is not the same as the law existing in France. In England, if you write a letter to a man, it is a confidential communication. A most scandalous statement may be sent in a letter, and there is no action because it is confidential. That is not the French doctrine. A libel does not depend upon the number of persons who are aware of it, but upon the occasion. If an employer tells a person who applies to him for information, that his clerk has robbed him, it is a confidential communication. It is not because the statement is made only to one person that it is confidential, but because it is a duty which devolves upon the employer. The telegraph company here are not in a similar position. It appears further, that Mr. Archambault could not obtain the name of the writer of the dispatch, and he had no recourse but to attack the company. They made themselves responsible for the circulation of the libel, and the Court below rightly held them in damages. The appeal of the company must therefore be dismissed.

It may be observed that the responsibility of the company will depend very much upon the terms of the dispatch. If it is ambiguous in its terms, they will not usually be held liable: the libel must be brought under their notice.

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As to the cross appeal of Mr. Archambault, $50 is no doubt a very small compensation for a person whose feelings have been greatly injured. But it must be borne in mind, in a new case like this, that the telegraph company's employees acted under the erroneous impression that they were bound to transmit everything that was given to them. There was no malice, nor is there any evidence that Mr. Archambault suffered one cent of damage. On these grounds I would not have disturbed a judgment allowing even so little as $50, though if I had been sitting in the lower court I would have given a larger sum than that. In another case which I remember, the Hon. Mr. Geoffrion was publicly accused on the hustings of having falsified a deed of acquittance. The accusation did him no damage, but he was urged by his friends to bring an action. He did so, and only obtained $50. I am not going to justify this judgment, but I would be disposed to let it stand. However, the majority of the Court are about to give a larger sum.

CROSS, J.:—

The telegraph company are in the position of simple transmitters of messages. They enable people to talk together, and so long as it is private and confidential, the communication must be very injurious indeed to make the company responsible. But here the telegram was neither private nor confidential. It was communicated to the associated press, and the company in assuming a different function becomes liable for what is injurious. The question then arises, was this message injurious? There is very little in the terms of the telegram itself that is injurious. All that is asserted is that a lawyer received money for a certain purpose, which he did not return: and there is also a reference to entertainments. There is nothing in the message to show that there was anything scandalous in the entertainments referred to. It is undoubtedly a slander to say of an advocate that he did not pay over money he received, but it is not to be visited with vindictive damages. The damages allowed

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by the Court below might have been more, but not necessarily so. It must be remembered that the employees of the company are sworn to secrecy. I concur with the Chief Justice in thinking that this Court ought not to go further in the matter of damages.

TESSIER, J.:—

Il s'agit d'une action en dommages pour libelle.

En février 1883, pendant que M. Archambault était à Québec, remplissant ses devoirs de député à la législature, quelqu'un expédia de Montréal par la voie de la compagnie du télégraphe, intimée, une dépêche adressée à l'agent de l'association de la presse. Cette dépêche fut publiée dans les journaux de Québec et reproduite dans ceux de Montréal et ailleurs.

Ce libelle était conçu comme suit :

"An action was entered here to-day by Mrs. Sylvia "Smyth, of this city, widow, to recover $915.00 from Mr. "F. X. Archambault, Q.C., M.P.P. The amount includes "an item of $300.00 handed defendant for security that "the plaintiff would appear in Court to answer a com- "plaint, which she did, and was discharged, but the "money was never returned. The balance was for enter- "tainments in the plaintiff's mansion for himself and "friends, which, it is alleged, defendant promised to "pay, but neglected to do so."

Il est établi en preuve que la femme en question était une personne de réputation plus que douteuse, de sorte que le scandale devait être beaucoup plus grave.

M. Archambault demanda à la compagnie de lui donner le nom du correspondant ; elle s'y refusa. Alors M. Archambault institua la présente action réclamant $25,000 de dommages.

La compagnie a plaidé en substance : Qu'elle n'est pas responsable envers l'intimé, à raison de ce qu'elle était tenue aux yeux de la loi de transmettre aux membres de la presse associée la dépêche en question en cette cause, comme toutes les autres dépêches qu'elle est tenue de transmettre dans le même ordre qu'elle les reçoit et

moyennant un certain prix qu'elle a reçu, et que d'ailleurs la substance de la dépêche avait été prise au greffe de la Cour Supérieure et extraite de la déclaration de la demanderesse dans la cause No. 1479 de Henrietta Sylvia Smythe Andrews v. Archambault, laquelle déclaration était ouverte au public, et que les faits y énoncés avaient déjà été publiés dans un journal à Montréal avant la date de la dite dépêche.

Ce n'est qu'à l'enquête que la compagnie a été forcée par ordre du juge de donner le nom du correspondant. Il a été établi qu'en effet au greffe du protonotaire de la Cour à Montréal, l'avocat qui avait pris le bref d'assignation, a montré la déclaration à ce correspondant qui en a pris un extrait, qui forme le libelle en question. On n'a pas essayé de prouver la vérité du libelle en question, l'action qui le contenait a été subséquemment entrée en Cour, et plus tard retirée.

La Cour Supérieure a condamné la Compagnie du Télégraphe à payer $50 de dommages et les frais. Les deux parties ont appelé de ce jugement.

Les questions peuvent se résumer à ceci :

1o. Y a-t-il libelle dans la publication d'un extrait d'une procédure judiciaire ? Il faut faire la distinction entre une procédure qui est devant la Cour, *coram judice, in open Court*, et une procédure *ex parte*, comme dans ce cas-ci, la déclaration de la demanderesse non assermentée, simplement certifiée par son procureur *ad litem*, qui n'est pas encore sous la vue et le contrôle de la Cour.

Odgers, on Libel, fait cette distinction, Nos. 243, 247 et 250, tout en disant qu'il y a eu des décisions différentes. Aussi Flood, on Libel, p. 189 et suivantes.

La seconde question est de savoir si la compagnie du télégraphe est responsable pour la transmission de ce libelle ; celle-ci s'appuie sur le statut général d'incorporation, Statuts Refondus du Canada, ch. 67, s. 14, mais ce statut ne l'oblige pas de transmettre toute dépêche quelconque, mais seulement de les transmettre dans l'ordre reçu. C'est le seul but de cette clause, et la pénalité ne s'applique qu'à l'interversion ou préférence indue dans

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l'ordre de transmission des dépêches. La section 16 ne s'applique qu'au secret à être tenu par les opérateurs. Ce statut ne peut justifier la compagnie de transmettre une dépêche contraire aux bonnes mœurs ou pouvant constituer ou encourager un crime ou un délit, par exemple, une dépêche chargeant quelqu'un d'en tuer ou assaillir un autre, ou de diffamer le caractère de quelqu'un.

Sourdat, No. 1320, dit: "Le directeur du télégraphe "peut dans l'intérêt de l'ordre public et des bonnes mœurs "refuser de transmettre les dépêches, sauf recours au mi- "nistre de l'intérieur ou du préfet."

Il est vrai que cela est dû à une législation particulière qui n'est pas en force ici ; mais cela exemplifie le principe général. La même doctrine se trouve enseignée dans le traité "Law of Telegraphs," par Scott & Jarnagin, No. 138*a*: "In the transmission of messages for publication, "especially letters and news for the public newspapers, "it would seem that telegraph companies assume a res- "ponsibility similar to that of publishers. By their "agency, libellous matters would be necessarily brought "to the knowledge of operators, who otherwise would "not have cognizance of it. By their immediate and "indispensable agency, press despatches and the like are "brought before the public."

Cotelle, II vol. Des chemins de fer et de la télégraphie, p. 466: "Le directeur du télégraphe peut dans l'intérêt "de l'ordre public et des bonnes mœurs refuser de trans- "mettre les dépêches....."

La Cour Suprême du Canada semble avoir confirmé le même principe de responsabilité *In re Dominion Telegraph Company & Silver*, 10 vol. Rapports C. Sup., p. 238.

Il y a unanimité de cette Cour à reconnaître la responsabilité de la compagnie du télégraphe.

Le juge de première instance la prononce, mais vu qu'il n'y a pas "de preuve spécifique du *quantum* du dommage éprouvé par le demandeur," dit le jugement, la condamnation est de $50 et les dépens."

Sur ce point, la majorité de cette Cour ne peut confirmer la condamnation à ce chiffre.

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La compagnie n'aurait dû être condamnée qu'à une somme nominale comme elle l'a été, si elle n'eut pas aggravé le mal ; mais elle l'a fait en refusant au demandeur de lui donner le nom de son correspondant, qu'après que l'action a été instruite à l'enquête et sur l'ordre spécial du juge ; elle a aggravé sa position en prenant ainsi la responsabilité du débat et forçant le demandeur de porter une action contre elle.

Les circonstances des parties doivent être pesées ; M. Archambault était avocat, conseil de la Reine, membre de la législature, père de famille ; la compagnie défenderesse est riche et puissante.

Si l'on veut à l'avenir empêcher que des libelles diffamatoires soient transmis d'un bout du pays à l'autre par les voies des compagnies télégraphiques, il faut prononcer une sentence sérieuse. La majorité de cette Cour croit qu'il n'est que juste et logique de prononcer une condamnation de $500 de dommages avec intérêt de ce jour et les dépens. C'est là le jugement de cette Cour.

The judgment of the Court is as follows:—

" La Cour, etc.....

" Considérant que le demandeur, appelant, poursuit la compagnie défenderesse, intimée, en réparation de l'injure qu'il prétend lui avoir été causée par la transmission au moyen du télégraphe de la dite défenderesse aux journaux de la presse associée, et de la publication du libelle désigné et rapporté dans la déclaration en cette instance ;

" Considérant qu'il est admis par la défenderesse, intimée, et autrement prouvé que la compagnie défenderesse a reçu et publié en le transmettant aux membres de la presse associée à Toronto et Ottawa, dans la province d'Ontario, et à Québec, dans la province de Québec, le libelle en question ;

" Considérant que le dit libelle est rédigé en termes propres à blesser l'appelant, dans ses sentiments et à lui nuire dans sa réputation, dans l'exercice de sa profession ;

" Considérant que la défenderesse intimée a plaidé en substance qu'elle n'est pas responsable envers le demandeur, en raison de ce qu'elle était tenue aux yeux de la

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loi de transmettre aux membres de la presse associée la dépêche en question en cette cause comme toutes les autres dépêches qu'elle est tenue de transmettre dans le même ordre qu'elle les reçoit et moyennant un certain prix qu'elle a reçu, et que d'ailleurs la substance de la dépêche en question avait été prise au greffe de la Cour Supérieure et extraite de la déclaration de la demanderesse dans la cause ci-après désignée, qui était ouverte au public, et que les faits y énoncés avaient déjà été publiés dans un journal à Montréal, avant la date de la dite dépêche ;

" Considérant que la défenderesse intimée n'a pas justifié les allégations de ses défenses, et spécialement qu'elle n'a pas prouvé que la déclaration dans la cause No. 1479 de Dame Henrietta Sylvia Andrews *vs.* Frs.-Xavier Archambault, datée le 20 de février 1883, et rapportable et rapportée en cour seulement le 14 de mars 1883, formât partie des archives de la Cour, fût ouverte au public, à la date de la transmission par la défenderesse du télégramme en question ;

" Considérant que la défenderesse intimée a publié le dit libelle autant de fois qu'il a été communiqué à ses propres employés qui l'ont lu et transcrit pour le transmettre et en le transmettant aux membres de la presse associée à Toronto, à Ottawa et à Québec ;

" Considérant que la publication d'un libelle est un délit aux termes de la loi, et que la loi, en obligeant la défenderesse à transmettre moyennant paiement toutes les dépêches privées qui lui seraient apportées pour être transmises, n'a pas eu en vue d'obliger la défenderesse intimée à transmettre des libelles et de participer ainsi à la commission d'un délit ;

" Considérant qu'il est prouvé que la défenderesse intimée a refusé de faire connaître au demandeur appelant l'auteur du libelle avant l'institution de la présente poursuite, et qu'elle en a en conséquence assumé la responsabilité ;

" Considérant qu'il est prouvé que le demandeur appelant a souffert des dommages considérables dans sa répu-

tation, et que ce libelle était de nature à lui faire perdre la confiance publique comme avocat et comme membre de la législature et à le couvrir d'opprobre comme père de famille ;

"Considérant que d'après notre système judiciaire, il y a appel du fait et du droit, et qu'il appartient à cette Cour d'élever ou diminuer le montant de la condamnation suivant les circonstances des parties et la preuve ;

"Considérant que dans l'espèce, le montant de la condamnation est insuffisant et n'est nullement proportionné à la gravité du libelle et du tort souffert par l'appelant ; la Cour procédant à réformer le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure à Montréal le dix avril 1884 ;

"Condamne la défenderesse intimée à payer au demandeur appelant, pour les causes énoncées dans la demande, la somme de $500 cours de cette province, au lieu de celle de $50 portée au dit jugement dont est appel, avec intérêt du 10 avril 1884, et les dépens tant en Cour de première instance qu'en appel (*dissentientibus* l'hon. Sir A. A. Dorion, J. C., et M. le juge Cross quant à l'augmentation des dommages.)"

Judgment reformed.
Cross appeal dismissed.

Archambault & St. Louis, attorneys for appellant.
Abbott, Tait & Abbotts, attorneys for respondent. (1)
(J. K.)

(1) Leave to appeal to the Privy Council was obtained by the Telegraph Company, but the appeal was not proceeded with.

September 17, 1887.

Coram DORION, C.J., TESSIER, CROSS, BABY, CHURCH, JJ.

McRAE v. THE CANADIAN PACIFIC RAILWAY Co.

Jury trial — Assignment of facts.

HELD :—The object of the assignment of facts is that the jury may determine all the finite facts in dispute between the parties, and respecting which the Court requires to be informed, in order to decide the question of law in issue between them. It must be so framed as to be sufficiently comprehensive, and at the same time carefully exclude any evidence from which the jury may draw an inference; and the assignment of facts in this case conformed to this rule.

The defendants moved for leave to appeal from an interlocutory judgment by which the following assignment of facts was confirmed :—

1. Was the plaintiff on the 9th and 11th days of July, 1885, travelling west of Biscotasing on the defendant's railway trains for the purposes of his trade, with regular tickets issued to him by defendants ?

2. Was the plaintiff, while travelling with said tickets, expelled from said trains on the days aforesaid, by order of the defendants ?

3. Was the plaintiff prevented by the defendants from travelling along the line of their railway west of Biscotasing after the 11th day of July, 1885 ?

4. Were the defendants justified in so expelling plaintiff from their trains, and in preventing him from travelling along the line of their railway west of Biscotasing, and if so, what are the reasons and grounds of such justification ?

5. Did the plaintiff suffer any damage and lose any merchandise or debts due to him by reason of being expelled from defendants' railway trains, and being prevented from travelling along the line of railway ?

6. Do you find for plaintiff or for defendants, and if for plaintiff, to what amount of damages is he entitled ?

CHURCH, J:—

This is an appeal from an interlocutory judgment, rendered on the 20th May last, on an assignment of facts made by the Hon. Mr. Justice Taschereau to be determined by the jury which should be empannelled in this case, and on a motion made on the 23d of the same month refusing to revise and amend the said first mentioned judgment.

The assignment was regularly made under Art. 352 of the Code of Civil procedure, but it is contended on the part of the appellants that the facts assigned do not comprehend all the facts necessary to be proved:

Secondly, because it is vague and in general terms, and leaves the case as if the parties had agreed to an open verdict. Thirdly, because it does not contain divers important and material facts alleged by the defendants (appellants) in their plea. Fourthly, because the assignment is irregular, and does not include all the facts which by law should be enquired into and passed upon by the jury on the issues raised between the parties. Fifthly, because the assignment of facts virtually decides the issues to be tried, and that in such a manner as not to be remediable by the final judgment.

The action is virtually one for breach of contract. The plaintiff (respondent) alleges that he was a trader, that as such he had been trading along the line of the appellants' railway for some two years; that he had during this period paid the appellants large sums of money for freight of goods and for his own passages over the line of their railway; that he had, on the faith of this continuing, built up an extensive trade, had brought in large quantities of goods and stored them for sale along the line, had given extensive credits east and west of a place called Biscotasing on the line of said railway; that hearing that appellants were going to take the trade into their own hands or put it in the hands of one of their own agents, one Harry Abbott, he, the respondent, repaired to the Railway to visit the places where his goods were stored, in order to sell them if needs be at a sacrifice, and to collect the debts due him,

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and that whilst in possession of a ticket and whilst travelling on the line, he was forcibly ejected at a place called Nemogesenda, and subsequently allowed to resume his journey, but that two days afterwards, at Kenogama, he was again forcibly expelled, at a place where there was no shelter, and that finally he was allowed to again enter upon the line, and was conveyed to some point eastward when it suited the appellants' pleasure to allow this to be done; that thus he suffered much personal discomfort, his trade was destroyed, his goods and credits lost, and he claims damages to the extent of $22,628.90, and files a bill of particulars shewing how this is made up.

The appellants meet this by a lengthy plea in which they set up that the portion of the line of railway alluded to by the plaintiff (respondent) was under construction and incomplete, and not accepted by the government, and not yet opened up for the conveyance of passengers and freight; that they had large numbers of men in their employ (about 3,000) who were difficult to control if permitted to obtain intoxicating liquors, and that if they obtained such, the work of construction was interrupted, and loss and damage occasioned; that under the authority of the law, the district traversed by the part of the Railway alluded to by the plaintiff was proclaimed, and the sale of intoxicating drink therein prohibited; that notwithstanding this proclamation, intoxicating liquors were surreptitiously and illegally introduced into the territory in question, by persons pretending to be traders and pedlers, and that the respondent (plaintiff) was one of those who thus acted, and that on two occasions prior thereto, the plaintiff had been duly tried and convicted of the offence of introducing and selling intoxicating liquors, contrary to law, and was duly punished for such misdeeds; that the appellants gave public notice that no traders or pedlers would be allowed to travel on their cars west of Sudbury, nor allowed on their right of way, nor on their *to be* road, nor in or about their buildings,—that the railway was only run for the convenience of the appellants, their agents and workmen, and that they were

not bound to carry anyone they did not wish to carry ;—and that they had a right to eject whomsoever they thought proper to refuse to carry ; that the plaintiff, illegally and without defendants' knowledge, got upon the cars on the date in question (9th July), going towards Nemogasenda, and there voluntarily disembarked, and that he was not ejected therefrom ;—that on the 11th July he, (plaintiff) again, in violation of the company's notice and rules, and without its knowledge, entered its cars going towards the 18th siding, when he was, a few miles from Nemogasenda, by one of the appellants' employees, requested to leave the cars, which he did without any force or compulsion being used,—that he afterwards, on application for permission to embark on the cars in order to leave the country, was permitted to do so, etc.

The appellants allege, moreover, that they carried goods which the plaintiff requested them to carry without delay, and moreover, did carry out from the country any goods which the plaintiff requested them to carry after the said 11th July, free of charge ; and the appellants further plead they are not guilty; and also file a *défense en fait.*

In addition to a general reply, the plaintiff filed an answer in which he says that inasmuch as the appellants continued to allow traders to travel over their lines after the notice of 23rd July, 1884, they treated it as being null and void and of no effect, and it was so considered.

These were the issues. Each of the parties furnished the Judge with a statement of facts which he or it thought should be submitted to the jury, and the Judge accepting neither, and as required by law, assigned the facts to be submitted to the jury, and they are as follows :—(*See facts above.*)

I think these facts cover all the facts upon which the jury should be required to pass, in order to enable the Court to determine the issues. What it is essential to determine is :—

Did the appellants undertake, as carriers, to convey the plaintiff from one point of their railway to another?

Was that undertaking violated by the defendants, (appellants) putting plaintiff off the train?

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Was the expulsion justified, and if so, what were the reasons or grounds, in the opinion of the jury, which justified such expulsion?

Did the plaintiff suffer any damage and loss as alleged by him?

And whether the jury find for plaintiff or defendants, and at what amount do they assess damages, if they found for plaintiff?

The object of the assignment of facts is, that the jury may determine all the finite facts in dispute between the parties, and respecting which the Court requires to be informed, in order to decide the question of law, which is in issue between them, viz., whether the plaintiff is or is not entitled to recover, and it must be so framed as to be sufficiently comprehensive, and at the same time carefully to exclude any evidence from which the jury may draw an inference. *Vide* Adams, Treatise on Trial by Jury, pp. 381, 385, 387-397.

We conclude, therefore, that in the said assignment of the Court below, there is no vagueness or indefiniteness in the facts, no leaving the verdict open, no suppressing of any fact material to be known, no suggestion of evidence made to the jury, although there is much, and in the opinion of the Court, justifiable suppression of a great deal of matter upon which one at least of the parties seemed to desire an expression of opinion from the jury, but which the Court has no interest in being informed upon, nor which, if passed upon by the jury, would alter the position of the parties towards each other on the issues joined between them, such as suggestions 11 to 20 of defendant's suggestions, and perhaps suggestion No. 12 of the plaintiff. Under the circumstances, and on the record as we find it, we are of opinion that the appeal should be rejected, and it is rejected accordingly with costs against the appellant.

Motion rejected.

Abbott, Tait & Abbotts, for defendant moving.

Joseph & Dandurand, contra.

(J. K.)

[IN CHAMBERS.]

November 18, 1888.

Coram CHURCH, J.

Ex parte CHARLES I. DEBAUN, petitioner for writ of *habeas corpus*.

Extradition — Habeas Corpus — Jurisdiction of committing Magistrate—Forgery—"Accountable Receipt"—R. S. ch. 165, s. 29—Alteration—Confession, Admissibility of—Informalities of Procedure.

HELD:—1. Where a commissioner has been appointed under the Great Seal of Canada (Sect. 5 of the Extradition Act, R. S. ch. 142), and his appointment as such commissioner has appeared in the official *Gazette*, and he is thereby "authorized to act judicially in extradition matters under the Extradition Act, within the Province," and he describes himself in a warrant of commitment, as "a Judge under the Extradition Act,"—that his jurisdiction is sufficiently disclosed.

2. In examining, upon a petition for *habeas corpus*, whether the detention of the prisoner is lawful, the Court or Judge will set aside the commitment only if there be manifest error in the adjudication. If the commissioner had jurisdiction, and there was legal evidence before him, which might justify a committal, the Court is not called upon to examine the sufficiency of the evidence.

3. If the first commitment be irregular, but be replaced, before the return of the *habeas corpus*, by a valid commitment, the prisoner will not be discharged.

4. (Approving the decision of Mr. Rioux, 11 Leg. News, 323,) A statement of account, such as is received by a bank, from other banks having business connections with it, and containing an acknowledgment of the receipt of money to be accounted for, is an "accountable receipt" within the meaning of R. S., ch. 165, s. 29, and the fraudulent alteration thereof is a forgery.

5. A confession as to alteration of such "accountable receipt," made by an officer of a bank, after his connection therewith has terminated, to a fellow employee, no director of the bank being present, is not made to a person in authority; and when such confession is made without any inducement being held out, and after the accused was warned not to state anything that he did not wish repeated to the directors, it is admissible in evidence.

6. In a case of forgery it is not necessary to prove the legal existence of the bank intended to be defrauded: it is sufficient to prove generally an intent to defraud; but in this case the legal existence of the bank was sufficiently proved.

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7. The omission, in the jurat, of the place where the depositions were taken is not material, where the place is mentioned in the heading or margin, and is otherwise certified to.
8. The fact that an indictment for embezzlement has been found against the accused, in the state from which he fled, does not prevent a demand being made for his surrender for forgery.
9. An alteration of a writing or "accountable receipt," made to cover a fraud previously committed, is a forgery, though no money was taken at that time.
10. In proceedings for the extradition of a fugitive, evidence to contradict that of the prosecution is not admissible. The accused is only entitled to show that the offence charged is not a crime mentioned in the treaty.

CHURCH, J.:—

The petition for this writ was presented to me here under the provisions of chapter 95 of the Consolidated Statutes of Canada, sections 1 and 2, which provide, the former—that all persons detained in any prison in Lower Canada shall of right be entitled to demand and obtain from the Court of Queen's Bench, or from the Superior Court, or any one of the judges of either of the said Courts, the writ of *habeas corpus*, and the latter provides for the bringing of the prisoner before the Court or Judge, and for the expense of doing so (which is to be borne by the petitioner), and for the delays to the return to the writ. In this case the distance being over thirty leagues, and not above sixty leagues, the delay allowed by the said Act is twenty days.

The facts and circumstances of the case are fully set forth in the judgment pronounced by Mr. Commissioner Rioux, and are to be found reported in the Legal News of October 13th and 20th, (Vol. 11, pp. 323, 329) together with the reasons for that judgment, and I do not think it necessary to do more than read them as therein set forth. The crime charged against the prisoner is forgery. It "is "alleged to have been committed within the jurisdiction "of the United States of America; the *corpus delicti* is "what is called an *accountable receipt*. The evidence as it "now stands consists in the following facts:—Up to the "middle of April last, the accused was an employee of "the National Park Bank of New York, and held there

"the position of assistant cashier. In that situation it "was customary for him to receive statements of accounts "from the divers banks which had business connections "with his own, in acting as their correspondents. These "accounts were received monthly, and in the early part "of the month. They contain an acknowledgment of "numerous items, such as drafts, cheques and notes, "which had been sent to them for collection by the "Park Bank; this was the credit side of the account. "They also contain a debit side composed of items re- "turned as unpaid, protest fees, cash remittances, etc. "The Farmers and National Bank of Baltimore was one of "the corresponding banks, and the forgery is alleged to "have been committed in connection with their state- "ment of account for the month of March last. The "transactions between the two banks appear to have "been extensive, and for that month exceeded half a "million of dollars. Between bankers and their em- "ployees these monthly statements were called *accounts* "*current*; in the information in this cause they are termed "*accountable receipts*, and their alteration is claimed to be "a forgery under section 29 of our Forgery Act. Section "46 is also quoted in support of the information. It is "also claimed to be a forgery at common law."

"The manner in which the forgery was effected will be found fully described in Mr. Commissioner Rioux's judgment, and I need not repeat it.

A very protracted and extended enquête was made and the prisoner was committed for surrender to the United States authorities.

During the statutory delay fixed by section 12 of the Extradition Act the prisoner applied for a writ of *habeas corpus*, and the prisoner being brought before me, there are submitted to my decision, as it appears to me, three questions:

First: Is the commitment or commitments valid?

Second: Does the evidence sustain the charge set forth in the commitment, viz., forgery; or should any portion of the evidence found in the record be disregarded as

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having been illegally admitted, or as being illegally obtained?

Third: Is the offence, as shown, an extraditable one?

The first objection taken to the commitment, schedule B, is that there is nothing on the face of it showing that Mr. Rioux had jurisdiction in the matter. I apprehend that the meaning of this objection is that as Mr. Rioux has described himself as "a Judge under the Extradition Act" in the body of the commitment, schedule B, and has signed the said commitment as "a Judge under the Extradition Act," and inasmuch as Mr. Rioux is, *de facto*, neither a judge of one of the Superior Courts, nor of one of the County Courts of any one of the provinces of the Dominion of Canada, but is, *de facto*, a commissioner who has been appointed for the purposes of "The Extradition Act" under the authority of that Act, and under the Great Seal of Canada (vide sect. 5 of cap. 142 of the R. S. of Canada), he had no authority to assume the style of "a Judge under the Extradition Act," that the assumption being unauthorized by the law, he assumed to act in a quality he did not possess, and that therefore the commitment is illegal and null, his true quality being that of a commissioner.

This objection is met by the prosecutors by a reference to the jailer's return, which includes, in the "cause for detaining" the prisoner, the schedule C, and which is another commitment for the same offence as that set forth in schedule B, but which purports to be given by Mr. Rioux in his capacity of "a Judge under the Extradition Act," to wit, it adds, "a commissioner appointed "under the Great Seal of Canada to act judicially in "extradition matters under the said Act within the "Province of Quebec." This commitment is signed "A Judge under the Extradition Act."

In answer to this, the prisoner's counsel object to its being received and considered, because they say it was delivered to the jailer after the fifteen days mentioned in section 12 of the Extradition Act had elapsed, and six days after the *habeas corpus* was delivered to the jailer.

And moreover they say schedule C does not purport to be an amended order or commitment, but is a commitment *de novo*, and that this is shown by the fact not alone of the different or additional title assumed by Mr. Rioux, but also by its date, which is that of the 20th October, whereas the date of schedule B is the 4th of October.

I may observe here that the jailer's return shows that the commitment, schedule C, was in fact delivered to him four days after the writ of *habeas corpus* was delivered to him, which latter was so delivered on the 16th day of October.

It will, I think, be convenient here to dispose of the question whether the first commitment was sufficient *quoad* the quality assumed by Mr. Rioux, and if not, whether it was made good by the second.

I observe in the first place that it is generally necessary as a matter of information to the Judge issuing the writ of *habeas corpus*, that he should have information as to the authority of the committing magistrate, in order that he may consider whether the detention is unlawful, and this may and usually does involve the necessity of the party or authority committing that such authority should appear and be claimed as it were in the body of the commitment; but when, for instance, a court of superior jurisdiction commits, all the authorities are agreed that such authority need not appear on the face of the commitment.

This might, if it were not for what I am about to say, require of me to consider the question of superior and inferior jurisdiction, and the relation which Mr. Rioux acting under the Act would bear to the matter, but I do not think it necessary I should do so on this occasion, and for this reason:—Section 5 of the Extradition Act declares that the judges of the Superior and County Courts are authorized to act judicially in extradition matters within the province where they exercise their functions. The same section provides for the appointment of commissioners under the Great Seal, for the same

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purpose, and these persons, viz., the judges and commissioners, are by the same sentence invested with the authority, and declared to be "authorized to act judicially "in extradition matters under the Extradition Act, within "the province" for which they are appointed. Now it appears to me that a person appointed under the Great Seal, and authorized to act judicially as regards process under a special law is, *quoad* the process taken under that special law and all proceedings authorized by it, "a Judge," and the circumstance that he is a Judge in another court, and appointed under another law to that court, neither makes him less or more a Judge in matters under the special Act than any other person appointed under it would be, although such other person's commission issues under the Act in question, and hence he is, perhaps, more appropriately styled a commissioner, although he is declared by the Act itself to be a Judge.

If I am right in this conclusion, then Mr. Rioux in describing himself as he did in the commitment, schedule B, merely declared he was what the statute declared he should possess the powers of, viz., the authority or power to act judicially in extradition matters, and if it is admitted, and I don't understand that it is seriously controverted, that Mr. Rioux, in all that he did in this matter up to and inclusive of the commitment on the 4th of October, was acting under the provisions of the Extradition Act, I don't see that there is any reason for quashing the commitment on that ground.

Besides, Mr. Rioux has been duly gazetted a commissioner under the Extradition Act. I am bound to take judicial cognizance of that fact, and hence I know that in this province, Mr. Rioux may exercise judicial authority under the Act, and I think I am bound by that knowledge.

Again, if I look at section 20 of the Act I find that the forms in the second schedule of the Act are declared sufficient and that "they shall be deemed valid." Mr. Rioux has followed one of those forms, and followed in its very terms by Mr. Rioux, should or can I declare that

invalid and insufficient which by the statute is declared sufficient and valid? I think not. Besides I am interpreting a treaty as well as a statute. Section 8 of the Extradition Act declares that the statute shall be so read and construed as to provide for the execution of the treaty arrangement, and I cannot think that in international conventions, where the utmost good faith is presumed to exist, not alone when entering into the covenant or arrangement, but in its execution afterwards, I don't think, I say, I would be justified in travelling very far afield to find technical objections to prevent or thwart the manifest intentions of the high contracting parties, always presuming that when so doing I am jealously watching over the liberty of the subject and the honor of the flag, which secures liberty to all who are entitled to its protection, whether citizen or alien.

I need not, holding these views, discuss the question whether I could receive evidence *aliunde* as to the authority of Mr. Rioux, or read the affidavit tendered by the prosecution, which has been prepared by Mr. Rioux, or look at his commission naming him a commissioner under the Act—nor is it necessary for me probably to enter into the question whether Mr. Rioux, sitting as a commissioner in extradition, is or is not a Court of inferior jurisdiction *quoad* myself, sitting here as a Judge of the Court of Queen's Bench, who, under the provisions of chapter 95, has granted a writ of *habeas corpus*. In fact, I think the expressions Court of superior jurisdiction, and Court of inferior jurisdiction, unless carefully kept within their legitimate meanings, are very well calculated to mislead, and that the decisions which are quoted as to the revisory and amendatory powers enjoyed by the former over the latter are likely to be misleading.

I do not consider that in matters of extradition, a commissioner in extradition, acting under the authority of the Act and within its scope, is one whit less clothed with authority than any Superior or County Court Judge would be; and I do not think that a Judge of the Court of Queen's Bench, as such, has any authority over

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his acts: but when assuming to act as a commissioner, he does something which is *ultra vires* of his powers or otherwise acts illegally, then, and then only, do the Superior Courts, by their writs of error, *certiorari* and *habeas corpus*, or the Judges who may legally issue them, become seized with revisory, amendatory or appellate powers.

In this matter, I would like to add, I am simply dealing with the question of the "unlawful detention" of the prisoner and nothing more: I am not sitting as a court of error or with the return to a writ of *certiorari* before me. I am simply considering what may properly be considered under a *habeas corpus*, with the advantage of having placed before me by consent of parties the record of the extradition commissioner's court.

A proceeding defective for irregularity and one void for illegality may be reversed upon error or *certiorari*, but it is the latter defect only which gives authority to discharge on *habeas corpus*, says Hurd; and he further adds: "An irregularity is defined to be the want of adherence "to some prescribed rule or mode of proceeding; and it "consists either in omitting to do something that is "necessary for the due and orderly conducting of a suit, "or doing it in an unreasonable time, or improper manner. "It is the technical term for every defect in practical pro- "ceedings or the mode of conducting an action or defence "as distinguishable from defects in pleadings. Illegality "is properly predicable of radical defects only, and "signifies that which is contrary to the principles of law, "as distinguished from mere rules of procedure. It "denotes a complete defect in the proceedings." Again, the same author, at page 363, says: "The power of the "court to declare the judgment of another a nullity "where that judgment is only brought collaterally in "question, is one which requires in its exercise cautious "circumspection, even where the question arises before "the highest judicial tribunal; and it becomes one of "exceeding delicacy where it arises before a co-ordinate, "or, as it frequently happens in *habeas corpus* (in the

"United States) before an inferior tribunal;" and at page 327 he declares the jurisdiction over the process through the writ of *habeas corpus* is only collaterally appellate.

The next question is this: Is all the evidence which has been produced in the court below legal evidence, and if not, what portion should have been rejected by Mr. Rioux?

In determining this I may at first sight seem to be departing from what I may describe as the concurrent or co-ordinate power of the commissioner with myself in extradition matters, but it will be observed in what follows that I am not considering or discussing the *weight* or value of evidence, but rather the question whether there is or is not evidence against the prisoner, for I apprehend that the moment I determine that there is evidence which would justify the arrest and committal of the prisoner for surrender, even although I myself might be of opinion that the evidence would scarcely justify such committal, I think I am precluded from interfering with the judgment of the commissioner. There is another authority which subsequently determines the question of surrender, and that with a full copy of the evidence before him, and I do not think that the statute, in reserving the benefit of *habeas corpus* to a person under the grasp of the Act and committed for surrender, intended to confer appellate powers on the judges authorized to issue the writ, except only so far as the question of an "unlawful detention" is concerned. *Vide* Clarke on Extradition, page 214: "Upon the return to the writ, "the court will enquire into the competence and suf- "ficiency of the evidence before the magistrate. If, "however, it appears that he was duly authorized to hear "the case, and that competent evidence was before him, "the Court will only set aside the commitment if there "has been manifest error in the adjudication as to its "sufficiency."

But if I had come to another conclusion and had determined the first commitment to be invalid, I find that Hurd, in his treatise on the writ of *habeas corpus*, at page

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251 of the second edition, says, after stating that "the "object of the proceeding (by *habeas corpus*) is to set the "prisoner free from present illegal restraint, and he is "entitled to it, although the original taking was lawful: "And if at the time of the return the defendant shows "a legal cause for restraint then imposed, the prisoner "will not be discharged, notwithstanding the original "warrant may have been without any legal authority. "And although the original warrant of commitment be "irregular, yet, if a regular warrant of detainer for the "same offence, issued subsequently to the writ of *habeas* "*corpus*, be returned, the Court will remand the prisoner" (see references given: *Rex* v. *Gordon*, 1 Barn. & Ald. 572 n.; *Queen* v. *Richards*, 5 Q.B. 926, vol. 48 E.C.L.; *Exparte Cross*, 2 Hurl. & Nor. 354; *In re Phipps*, 11 W.R. 730 Q. B.), and I am inclined to agree in this view, and I would not have hesitated to look at the second commitment as determining whether there was or was not a legal cause of restraint, and when it commenced.

The same author, on page 327, says, in speaking of the defects cognizable under the writ of *habeas corpus*: "The "jurisdiction over the process being only *collaterally* appel- "late, the *habeas corpus* cannot have the force and operation "of a writ of error or *certiorari*, nor is it designed as a "substitute for either. It does not, like them, deal with "errors or irregularities which render a proceeding void- "able only, but with those radical defects which render it "absolutely void." And he adds that in *Huguet's* case, on the question of whether the Court should examine the sufficiency of the evidence before the Police Magistrate, the Court held it was not called upon to do so, and upon this point, Baron Martin said: "The question is, was this "proceeding within the jurisdiction of Sir Thomas Henry? "I don't say that if there had been no evidence before "him, or he had acted contrary to law, we would not "have discharged the prisoner, but it appears to me that "all the proceedings have been properly taken. This is "not a court of appeal from his decision and it is for him "to decide whether or not the evidence is sufficient."

Vide ex parte Huguet, 29 L.T. (N.S) 41; also see Clarke on Extradition, third edition, pages 170 and 171; *R.* v. *Maurer*, where Fields, J., said: "It appears to me that the "decision in *Huguet's* case is completely in accordance "with the principles on which the courts act, and have "always acted, with reference to the adjudications of "justices in general, and without that decision I think "we would have come to the same conclusion. The "statute says that the magistrate shall have the same "jurisdiction as nearly as possible as if the prisoner were "brought before him charged with an indictable offence "in England. So long as the magistrate keeps within "his jurisdiction, we have no power to interfere with his "decision. It is only when there is no jurisdiction, as "when there is no evidence before the magistrate, that we "can interfere." See also Clarke, second edition, page 62. In the case of *Alexander Heilbron*, Judge Ingersoll followed the decision of Judge Judson in the case of *Veremaitre*, and Judge Bell in the case of *Kane*, and refused to entertain the question of the sufficiency of the evidence upon which the commissioner acted. I think, in one word, that whilst I could and should say in a given case whether there was or was not legal evidence, once I have determined that there is and was legal evidence which might have justified committal for surrender, I ought to stop there. Of course if in a given case I concluded that there was no evidence which would or did justify a committal, from that moment I must conclude the detention is and was unlawful, and grant the writ.

I do not think I can improve upon the observations which Mr. Rioux has made as respects the question whether the document produced and filed is or is not an accountable receipt within the meaning of the law, nor as to the question whether this is or is not a forgery at common law or under the statute; but I may be permitted to say this, that the fraudulent intent must have existed at the time he took the money, and although the forgery which was committed was not contemporaneous with the taking of the money, it was simply because

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from the nature and manner in which the transactions were carried out it was impracticable for him at the moment to cover up his fraud by the forgery, but as soon as it was practicable and as soon as the danger of detection became imminent unless the forgery could be effected, he, the prisoner, at once effected it, and the immediate result of this forged return was that a fraud was effected against the Bank of Baltimore, which had issued the accountable receipt, and it also was a forged *titre de créance* in the hands of the Bank whose employee the prisoner was, and in that way, to my mind at least, there were the essential conditions of one continuing act, commencing in fraud, developing into forgery, and involving a prejudice against either of the parties, according to the capacity of the one, (to show that it was forged), against whom it purported to make, or against the holder, whose property it was.

I do not think I can add anything to the judgment of Mr. Rioux as to the admissibility of the confession or admissions of the prisoner. I do not think Mr. Hubbell has been shown to be the agent of the Bank to such an extent as would exclude the admissions made to him by the prisoner in view of the conversations which took place between them; and, although, if the matter had rested where Mr. Caldwell left it, I would have been disposed to reject the confession, nevertheless, in the light of the conversation held directly with the prisoner and Mr. Hubbell, and which I consider entirely superseded the *pourparlers* of Mr. Caldwell and Mr. Hubbell, and which were instigated by the prisoner, I am of opinion the evidence of Mr. Hubbell was properly admitted.

I have gone over the record with great care, and have looked into many of the authorities snbmitted, and I have given to the consideration of this case all the time and attention which its importance demands and I could afford, with proper regard to my other duties, and I fully endorse the conclusions arrived at by Mr. Rioux in the matter, and his action therein. A few words about the *Zink* case.(1) In the first place the *Zink* case was a proceed-

(1) 6 Q. L. R. 260.

ing under 31 Vict., cap. 94; this statute has been replaced by the Act 40 Vict., cap. 25; in that Act no form of committal was given, and especially was there no corresponding clause to sect. 20, which makes a committal such as the one under consideration good and valid. It therefore, as it appears to me, has ceased to be a rule to me, or a decision which I am bound to accept as declaratory of the present law. Besides, there is the *Phelan* case since then, reported in 6 Leg. News, at page 261, which shows that a change had been introduced in the procedure since the date of the judgment in the *Zink* case.

There only remains the third question, is the offence an extraditable one? It will at once be seen from what I have said, that having concluded that the offence is forgery, and that the evidence sustains the charge to the extent required by the statute, and forgery being one of the offences enumerated in the Statute for which extradition may be asked, that the prisoner must be remanded back to the custody of the jailer of the district of St. Francis, there to be by him safely kept until he is thence delivered pursuant to the provisions of the Extradition Act, and I therefore order and direct as follows:—

"The petitioner, Charles I. DeBaun, being now present here in court, by virtue of a rule of this court, it is ordered that the jailer of the district of Montreal, present here in court, do deliver the said Charles I. DeBaun, the petitioner, into the custody of the sheriff of the district of Montreal, present here in court, who is hereby ordered to receive the said Charles I. DeBaun and to convey the same to the common jail of the district of St. Francis, and there to deliver the said Charles I. DeBaun into the custody of the sheriff of the said district and of the keeper of the said common jail, who are hereby ordered to receive the said Charles I. DeBaun into their custody and to safely keep him, until duly discharged in due course of law, according to the terms of the commitments of G. E. Rioux, a judge under "The Extradition Act," and dated respectively the fourth day of October and the twentieth day of October, A. D. 1888. And it is further ordered

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that the expense of reconveying the said Charles I. De Baun to the said common jail of St. Francis be repaid to the sheriff of the district of Montreal by the said Charles I. DeBaun."

Commitment sustained.

J. Dunbar, *Q.C.*, and *Wm. White*, *Q.C.*, for the prosecution.

G. Irvine, *Q.C.*, and *W. B. Ives*, *Q.C.*, for the prisoner.

(J.K.)

September 17, 1887.

Coram DORION, C. J., TESSIER, CROSS, BABY, CHURCH, JJ.

JOHN NEWTON,

(*Plaintiff in Court below*),

APPELLANT;

AND

CHARLES SEALE ET AL.,

(*Defendants in Court below*),

RESPONDENTS.

Testamentary executor—Account—Legatee.

HELD:—That after a testamentary executor has been discharged by a deed signed by all the legatees, an action against him praying for an account, brought by one of the legatees who joined in the discharge, and without asking that the discharge be set aside, will be dismissed.

The appeal was from the following judgment, rendered by the Superior Court in the district of Terrebonne (BÉLANGER, J.), October 31, 1885:—

"La Cour, etc.....

"Considérant qu'il est en preuve que le 8 novembre 1879, le demandeur fut mis en possession de tous les biens tant mobiliers qu'immobiliers auxquels il avait droit en vertu du testament de feu Robert Newton;

"Considérant que par acte en date du dit jour, 8 no-

vembre 1879, reçu devant Maître M. Prévost, notaire, le dit demandeur reconnut que les dits défendeurs avaient rempli leurs devoirs comme exécuteurs testamentaires du dit feu Robert Newton, qu'il approuva, confirma et ratifia leur conduite et reconnut avoir reçu d'eux les legs à lui faits par le dit Robert Newton, se déclarant satisfait et promettant ne les jamais troubler ni inquiéter, déclarant qu'ils lui avaient rendu compte, et qu'il leur donna là et alors pleine et entière quittance, générale et finale ;

" Considérant qu'il est aussi en preuve, tant par les pièces au dossier que par les admissions du dit demandeur, contenues en sa déposition comme témoin des défendeurs, que le dit demandeur a été mis en possession de tous les biens tant meubles qu'immeubles, titres de créances, dettes et obligations lui revenant par et en vertu du dit testament, et qu'après avoir été ainsi mis en possession des dits biens, le dit demandeur a lui-même payé et acquitté des dettes du dit feu Robert Newton ;

" Considérant qu'il est établi que les dits défendeurs ont rendu au dit demandeur un compte en leur susdite qualité d'exécuteurs testamentaires du dit feu Robert Newton, ainsi que le dit demandeur l'a lui-même reconnu dans les actes produits ;

" Considérant qu'il est prouvé qu'après la date du 8 novembre 1879, les dits défendeurs n'ont fait aucun acte comme exécuteurs testamentaires du dit feu Robt. Newton pour lesquels ils puissent être contraints de rendre compte au dit demandeur ;

" Considérant que vu le compte déjà rendu par les dits défendeurs en leur dite qualité d'exécuteurs testamentaires du dit feu Robert Newton, le demandeur n'aurait tout au plus contre les dits défendeurs qu'une action en redressement de compte ;

" Considérant que le dit demandeur ne demanda pas, par son action la résiliation et la nullité de la quittance et décharge par lui donnée aux dits défendeurs ès-qualité, le 8 novembre 1879 ;

" Considérant enfin que le dit demandeur n'a pas prouvé les allégués de sa déclaration et que les dits défendeurs

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ès-qualité, ont prouvé et établi les allégués de leur exception et défense;

"Déclare les dites exception et défense bien fondées et les maintient, et déclare l'action du demandeur mal fondée et la renvoie, avec dépens, distraits, etc."

May 25, 1887.]

C. H. Stephens, and *J. Palliser*, for the appellant:—

The issues presented are:

(1). Are the respondents bound to render an account of their administration to the appellant notwithstanding the settlement (*quittance*) of the 8th November, 1879, signed by all the legatees but not by the executors.

(2). Is the account of the 28th March, 1880, before Mr. Prévost, N.P.,—purporting to be an account of the administration of the respondents of the said succession—an account in form such as the respondents were bound to render, and must the appellant accept it as a faithful and detailed account of the executors' administration subject to his right to contest it.

The discharge was not such as the law requires, and may be treated as a nullity. The judgment appealed from is erroneous when it holds that the respondents have rendered an account such as the law requires, and that appellant's only recourse was an action *en redressement de compte*. An action could not legalize or reform a document which was illegal, and an absolute nullity. There is error also where it holds that by reason of the discharge of the 8th November, 1879, the respondents were released from their legal responsibility to render an account, and that the appellant should have asked in his present action for the resiliation of the *quittance* in question; because aside from the said discharge not being preceded by a detailed account, there is proof of record of a promise on the part of the respondents—at the time of the execution of the said discharge—to render an account within twelve days. And the appellant does not desire to have the discharge set aside, because it affects and settles his relations with the particular legatees to whom he was bound, but does not, he maintains, release

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the respondents from their legal obligations towards him.

Prévost, Q.C., for the respondents :—

Les intimés soumettent :

Que l'intérêt étant la mesure des actions, l'appelant n'a aucun intérêt quelconque dans son action en reddition de compte, et que cette action est frivole et vexatoire, puisqu'il reconnait lui-même, sous serment, avoir été mis en possession avant sa dite action, de tous les biens immobiliers, mobiliers, créances et titres de créances à lui légués par le dit Robert Newton. D'ailleurs, par l'acte du 8 novembre 1879, il a non-seulement reconnu cette délivrance, mais il a de plus donné une décharge entière et complète aux dits intimés. Cette décharge est au dossier ; il appert par icelle qu'un compte a été rendu au dit appelant, selon le chapitre de l'inventaire qui le concerne, cette quittance est en pleine force et vigueur, elle n'est et ne peut être nulle de plein droit, elle ne pourrait être qu'annulable, s'il y avait cause, la nullité n'en est pas même demandée par l'action ; dans les circonstances, elle doit donc avoir son plein et entier effet.

CROSS, J. (for the Court) :—

Action by a universal residuary legatee against executors to account. The action has been dismissed and the legatee has appealed.

The late Robert Newton made his last will on the 4th of April, 1879, and died 11th May, 1879. By the will, he bequeathed specific properties and movables to a number of persons, including his wife, and the residue to the appellant.

He was *commun en biens* with his wife, Mary Ann Hammond, who survived him. She and the executors on the 6th August, 1879, proceeded to make an inventory, the appellant being present, assisted by his notary, taking part in the proceedings and signing the inventory.

The widow remained in possession from the decease of her husband until the 8th November, 1879, at which date Mrs. Newton made a conditional renunciation of the com-

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munity with certain small reserves, including money in hand, a colt and a rake,—to be null and void if the condition was not held good.

On the same day, 8th November, 1879, the appellant appears to have been put in possession of his legacy. He, as well as the special legatees, by a general discharge executed on that day, before Prévost, notary, to which Mary Ann Hammond was also a party, declared that they had respectively received their legacies, acknowledged that the executors had completely fulfilled their functions, and were finally discharged, having been put in possession of the estate.

The appellant brought an action for an account against the respondents, who pleaded that it was premature, and, although not bound, tendered an account.

This action was dismissed as prematurely brought.

The present action was brought for an account, alleging that the account rendered was irregular, insufficient, erroneous, and without vouchers, giving no account of administration; that the reserve in the widow's renunciation was null and the effects retained were not accounted for; but making no mention of the discharge of the 8th November, 1879.

We are of opinion that the present action cannot be maintained, the discharge of the 8th November, 1879, not being called in question, nor any demand being made to set it aside. We consider that the respondents have established their case to the fullest extent, and that the judgment which dismissed the appellant's action is correct. It is, therefore, confirmed.

Judgment confirmed.

J. Palliser, attorney for appellant.

Prévost, Bastien & Prévost, attorneys for respondents.

(J. K.)

March 26, 1888.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

HORACE FAIRBANKS ET AL.,

(*Intervenants in Court below*),

APPELLANTS;

AND

JAMES O'HALLORAN,

(*Plaintiff in Court below*),

AND

THE MONTREAL, PORTLAND & BOSTON RAILWAY CO.,

(*Garnishee in Court below*),

RESPONDENTS.

M. P. & B. Railway Co.—Quorum of Directors—Declaration of garnishee—Fraud—Motion in appeal for leave to make new declaration.

HELD:—1. Where the quorum of directors of a railway company was fixed at three, by a special statutory provision, and the company was subsequently amalgamated with another company, and it was provided by the Act of Amalgamation that the Board of Directors of the amalgamated company should not be less than five nor more than seven directors (without expressly changing or regulating the quorum), that the original provision, making three directors a quorum, continued in force.

2. In determining whether a declaration was made by a garnishee fraudulently and collusively, the principle applicable is, that it is only when an act operates a prejudice to legal rights that the motive can be questioned, and it is only a party who has been prejudiced that is entitled to complain. The facilitating of legal remedies by a debtor in favor of his creditors does not amount to fraudulent collusion. And in the present case there was sufficient evidence of the indebtedness declared by the garnishee, apart from the existence or validity of the lease referred to in the case.

3. Where the contestation by intervenants of a garnishee's declaration has been dismissed, and the judgment dismissing it has been appealed from, the Court of Appeal will not entertain an application by the garnishee to be permitted to set aside the former declaration and make a new one.

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The appeal was from three judgments, rendered at the same time, by the Superior Court, Montreal, JETTÉ, J., Sept. 20, 1886, dismissing a contestation by the intervenants, now appellants, of a declaration made by the Montreal, Portland & Boston Railway Company, garnishees.

The respondent O'Halloran was plaintiff in three cases in the Superior Court. In one, Bradley Barlow and the South Eastern Railway Company were defendants. In another, Bradley Barlow alone was defendant, and in the third, the South Eastern Railway Company alone were defendants. In all three cases, O'Halloran obtained judgment against the defendants, and issued writs of attachment by garnishment in the hands of the Montreal, Portland & Boston Railway Company, who declared that they owed Barlow an amount, with interest, of $18,886, and owed the South Eastern about $185,000.

Before judgment was rendered on this attachment, the present appellants obtained leave to intervene, as being creditors and bondholders of the Montreal, Portland & Boston Railway Company, and interested in seeing that no irregular or improvident judgment was rendered against the Company, and as being judgment creditors of Barlow. The grounds of the intervention and the questions at issue appear from the judgments.

The following was the judgment of the Superior Court in one of the cases, the three being alike:—

" La cour, etc.. ...

" Attendu que O'Halloran, créancier des défendeurs Barlow et la compagnie de chemin de fer du Sud-Est, pour une somme de $10,000, pour laquelle il a jugement contre eux, se pourvoit en exécution de ce jugement par voie de saisie-arrêt entre les mains de la compagnie de chemin de fer de Montréal, Portland & Boston, et que celle-ci a déclaré devoir:—

1o. Au défendeur Barlow une somme de $18,886 en capital et intérêts, en vertu d'un jugement rendu le 7 mai 1880, contre la compagnie tiers-saisie, en faveur de la

Banque des Marchands du Canada, et transporté le 2 avril 1883 au dit défendeur Barlow.

2o. A la compagnie de chemin de fer du Sud-Est la somme de $185,000 pour améliorations et augmentations faites à la voie ferrée de la dite compagnie tiers-saisie par la compagnie défenderesse;

"Attendu que les intervenants, créanciers de la compagnie tiers-saisie, dans le but de protéger leur créance contre cette compagnie et d'empêcher que les biens d'icelle ne soient affectés au paiement de créances fictives, contestent la saisie du demandeur et soutiennent:

1o. En premier lieu que la déclaration faite par la tiers-saisie comme susdit est illégale et nulle, parcequ'elle n'a pas été autorisée par un *quorum* régulier des directeurs de la dite compagnie.

2o. En outre que cette déclaration est frauduleuse et qu'elle a été faite collusoirement et de concert entre le demandeur qui est lui-même un des directeurs de la dite compagnie tiers-saisie, et les trois directeurs qui l'ont autorisé et les syndics de la compagnie de chemin de fer du Sud-Est défenderesse, et les directeurs de la compagnie du chemin de fer du Pacifique.

3o. De plus qu'aucun bail régulier du chemin de la compagnie tiers-saisie n'a été consenti à la compagnie défenderesse, savoir la compagnie du chemin de fer du Sud-Est; que tel bail s'il a eu lieu, n'a jamais été ratifié par les actionnaires; qu'aucun compte n'a été rendu par la compagnie défenderesse à la compagnie tiers-saisie, et qu'en conséquence il ne peut exister aucune dette de la compagnie tiers-saisie à la compagnie défenderesse.

4o. Enfin que si la compagnie défenderesse a fait des améliorations ou travaux à la voie ou chemin de la compagnie tiers-saisie, ces améliorations ont été compensées par les revenus perçus; et que d'ailleurs ces améliorations ont été payées par le défendeur Barlow, et non pas par la compagnie défenderesse:

Les intervenants demandent en conséquence:

a.—Que la déclaration de la compagnie tiers-saisie soit déclarée nulle et frauduleuse et mise à néant:

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b.—Et subsidiairement que les créanciers du défendeur Barlow soient, vu sa déconfiture, notifiés d'avoir à réclamer leur paiement au marc la livre;

"Attendu que la compagnie tiers-saisie a été formé par la fusion de deux compagnies ci-devant connues sous le nom de 1o. compagnie de chemin de fer de Montréal, Chambly et Sorel, et 2o. The Missisquoi Junction Railway Company, et que par le statut édictant l'union des dites compagnies, il est déclaré que dans tous les cas de conflit entre les dispositions des chartes des dites compagnies, celles de la charte de la compagnie de Montréal, Chambly et Sorel prévaudraient;

"Attendu que par un amendement préalablement accordé par la législature, la charte de la dite compagnie de Montréal, Chambly et Sorel à laquelle l'acte de fusion accordant la prépondérance, avait été amendé de manière à fixer à trois le *quorum* des directeurs d'icelle;

"Attendu que la résolution sur laquelle a été faite la déclaration de la tiers-saisie en cette cause, a été adoptée par trois directeurs d'icelle conformément à la disposition susdite et que cette résolution est en conséquence regulière et légale;

"Attendu que les intervenants n'ont pas prouvé que la dite résolution soit entachée de fraude, ni qu'elle ait été concertée entre le demandeur et les directeurs de la compagnie défenderesse ou d'autres personnes, et qu'il appert en preuve que le demandeur n'était plus directeur de la dite compagnie lorsque cette résolution a été adoptée:

"Attendu que, contrairement aux allégations des intervenants, il ressort de la preuve qu'un bail du chemin de la compagnie tiers-saisie a été consenti à la dite compagnie défenderesse et que celle-ci exploite le dit chemin depuis novembre 1879 en vertu de la convention de bail alors arrêtée; qu'elle a depuis fait des travaux et améliorations considérables au chemin de la tiers-saisie, et que le chiffre de $185,000 admis par la dite tiers-saisie ne parait pas dépasser la valeur de ces travaux et améliorations;

"Attendu que les intervenants ont failli de prouver que ces travaux et améliorations ont été compensés par les

loyers dus ou les revenus perçus par la compagnie défenderesse, ou qu'ils ont été payés par le défendeur Barlow;

"Attendu que la contestation des intervenants est en conséquence mal fondée en tous points;

"Attendu néanmoins que la déconfiture du débiteur commun Barlow, est établie :

"Vu l'article 622 du Code de Procédure Civile :—

"Renvoie la contestation de la déclaration de la tiers-saisie par les intervenants ; mais vu la déconfiture du défendeur Barlow, enjoint à la tiers-saisie de déposer au greffe de cette cour, sous quinze jours de la signification du présent jugement, la somme de $18,386 qu'elle reconnait lui devoir comme susdit, avec tous intérêts échus depuis, et ordonne que les créanciers du dit Barlow soient ensuite notifiés conformément à la loi, pour être ensuite procédé à la distribution de la dite somme conformément aux droits de chacun, et condamne la compagnie tiers-saisie, savoir la Montreal, Portland & Boston Railway Company, sous quinze jours de la signification de ce jugement, à payer au demandeur sur et à même la dite somme de $185,000 qu'elle a reconnu devoir à la compagnie défenderesse 'The South Eastern Railway Company,' celle de $10,000.24 montant du jugement du dit demandeur en capital, avec intérêt sur $10,000 à compter du 14 août 1883, et les dépens des présentes distraits, etc., et en ce faisant sera la dite Montreal, Portland & Boston Railway Company valablement déchargée.

"Et la Cour condamne les intervenants aux dépens encourus sur la contestation de la déclaration de la tiers-saisie et en accorde distraction, etc."

The intervenants appealed. While the case was before the Court of Appeal, the Montreal, Portland and Boston Railway Company, garnishees, moved (Nov. 24, 1887) for leave to make a new declaration, alleging that the former one had been made in fraudulent collusion with the plaintiff. The directors in office at the time it was made had since been ousted on a *quo warranto*.

The Court (Nov. 25) directed that this motion be united with the hearing on the merits.

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Jan. 18, 19, 20, 1888.]

A. D. Nicolls, for the appellants.

Hutton, *Q. C.*, *Geoffrion*, *Q. C.*, and *F. McLennan*, for the garnishee, respondent.

O'Halloran, *Q. C.*, respondent, in person.

March 26, 1888.]

CROSS, J. (for the Court) :—

Appeals are taken in three cases from judgments overruling and dismissing the contestations of the declarations of the garnishee, *tiers-saisie*, made in these three cases.

The material facts of the controversy may be stated as follows:—

The respondent, James O'Halloran, having three judgments in his favor, each for a considerable amount, one under No. 1384 against Bradley Barlow and the South Eastern Railway Company ; one under No. 1799 against Bradley Barlow alone; one under No. 2105 against the South Eastern Railway Company alone, for three separate debts, on the 27th of March, 1885, sued out three separate writs of attachment, *saisie-arrêts*, for the satisfaction of his judgments, to seize in the hands or possession of the Montreal, Portland, and Boston Railway Company, such money, value or indebtedness as they might have belonging or due by them to the South Eastern Railway Company.

The garnishees appeared by their secretary-treasurer, M. S. Lonergan, specially authorized by a resolution purporting to be passed by the board of directors, and made a declaration in each case, stating in effect that the Montreal, Portland & Boston Railway Company owed Barlow, $18,386, the capital and interest of a judgment against that company obtained by the Merchants' Bank, on the 7th of May, 1880, transferred to Barlow, 2nd May, 1883, and that they owed the South Eastern Railway Company $185,000 for ameliorations and improvements made upon their railway by the South Eastern Railway Company.

Hereupon the appellants, Fairbanks *et al.*, filed an intervention, in which they alleged :

1. That they were creditors of the *tiers-saisie*.

2. That the declaration of the *tiers-saisie* was illegal and fraudulent, and procured by collusion and fraudulent conspiracy between the plaintiff and three other directors, and that at the time when it was procured, plaintiff himself was a director, and that the resolution authorizing it was passed by only three directors, whereas the board consisted of seven.

3. That plaintiff is in collusion with the trustees of the South Eastern Company to illegally retain control of the Montreal, Portland & Boston Railway, and was a party to divers legal proceedings to that end.

4. That the Eastern Townships Bank and the Canadian Pacific Railway Company are large creditors of the South Eastern Railway Company, and that they are in collusion with plaintiff to give him an undue preference over other creditors of the *tiers-saisie*.

5. That the railway of *tiers-saisie* was never legally leased to the South Eastern Railway Company, and that a certain lease referred to by intervenants was false and fraudulent, and was never ratified by the shareholders of *tiers-saisie*.

6. That any improvements that may have been made by the South Eastern Railway Company on the property of the *tiers-saisie*, have been compensated by the rent which the former company should pay for the use of the latter's railway.

7. That any improvements that may have been made, were paid for by Bradley Barlow, and not by the South Eastern Railway Company.

8. That nothing whatever is due by the *tiers-saisie* to the South Eastern Railway Company.

9. That Bradley Barlow is insolvent, and plaintiff is striving to obtain an undue preference over other creditors among whom are intervenants.

10. Conclusion that the declaration of *tiers-saisie* be declared illegal, false and fraudulent, and set aside; and that in any event, the creditors of Barlow be called in, (in the cases where he is a party) and that in the event of the *tiers-saisie* not admitting the truth of the allegations of said

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intervention, the same do serve as a contestation of garnishee's declaration.

O'Halloran contested the intervention, maintaining that the attachments were regular and just, that there was no fraud in his demand or proceedings, or in the declarations of the garnishees, and that a like declaration had been made in another case of attachment issued at the instance of Roderick Davidson, another creditor of the South Eastern Railway Company.

The Montreal, Portland & Boston Railway Company also contested the intervention. The South Eastern Railway Company did not contest.

The judgment appealed from has sustained the contestation. We are now called upon by an examination of the issues and proof, and the arguments of the parties, to pronounce upon the validity of that judgment.

It appears that but three directors were present and concurred in the resolution authorizing Lonergan, the secretary-treasurer, to make the garnishee's declaration. Thereupon the question presents itself whether three directors formed a quorum, and had authority under their charter to pass such a resolution to be binding on the company. The argument urged against the sufficiency of the authority is, that the Montreal, Portland & Boston Railway Company was originally the Montreal, Chambly and Sorel Railway Company, which by Statute of Quebec, 37 Vict.. cap. 24, became amalgamated with the Missisquoi Junction Railway Company under the name of the Montreal, Chambly & Sorel Railway Company, a name which was afterwards, by the 38 Vic., c. 70, of Quebec, changed to that of the Montreal, Portland & Boston Railway Company; that although by the Statute of Quebec 36 Vic, c. 45, s. 1, the quorum of directors was fixed at three, and although by the amalgamating Act 37 Vic., c. 24, the provisions of the charter of the Montreal, Chambly & Sorel Railway Company were to prevail where they differed from those of the amalgamated Missisquoi Junction Railway Company, nevertheless, as in the amalgamating Act, provision was made for a complete board of directors to be not less than

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five, nor more than seven, the special provision making three directors a quorum, contained in 36 Vic., c. 45, sec. 1, should be considered superseded, and that a quorum required to consist of a majority of the directors, the number whereof continued practically to be seven. What would seem to be a conclusive answer to this reasoning, is that sec. 1 of 36 Vic. cap. 45, was a special provision giving three directors, in distinct terms, powers as a quorum—a power which was not interfered with by a subsequent general provision, regulating the number of directors without expressly changing the quorum. Besides which, the company, knowing of this declaration, did not for a long time seek to change it; on the contrary they sustained it by their pleading to the intervention.

There remains the main contention of fraud and collusion, respecting which it may be remarked, that acquiescence and even facilitating legal remedies by debtors in favor of creditors cannot amount to fraudulent collusion. It is only when acts operate a prejudice to legal rights that their motive can be questioned, and it is the parties who are prejudiced who only have the right to complain. In the present case, if the Montreal, Portland & Boston Railway Company really owed the South Eastern Railway Company to an extent sufficient to cover the attachments, any irregularity as to the causes or manner in which the debt was incurred would be of no consequence. On the contrary, if the proof goes to the extent of showing that the debt is not due, then the intervention should be sustained and the declaration of the garnishees overruled and rejected.

I would first, however, refer to the allegation by which it is pretended that O'Halloran would obtain a fraudulent preference by virtue of his attachments. This, I think, cannot occur. Already the sum due to Barlow, he being insolvent, is ordered to be distributed among his creditors *au marc la livre*. As regards the amount which the Montreal, Portland & Boston Railway Company is said to owe, in case judgment passes on the attachments, if the company is solvent, they will pay; if insolvent, the amount

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may be levied by execution, and must be distributed in like manner as in the case of Barlow.

As regards the allegations of fraud and collusion, circumstances are adduced in proof which one might readily conceive might have an influence on issues different from what are raised in this cause; but so far as they apply to the issues now under consideration, they do not seem to be material, in consequence of the absence of one element, viz., that they fall short of refuting the presumption established by the evidence that the debt was really due by the Montreal, Portland & Boston Railway Company to the South Eastern Railway Company according as declared by the former company.

The circumstances impeaching the regularity of the proceedings leading to the declaration are, 1st. That Mr. O'Halloran was a director at the time the resolution was passed authorizing the declaration; that he tampered with the minutes to show that his resignation had preceded the resolution, although the fact was otherwise. 2nd. That there was no regular lease executed by the Montreal, Portland & Boston Railway Company to the South Eastern Railway Company. 3rd. The contention that no debt was due, because the lease was fraudulent. 4th. That Bradley Barlow furnished the money and made the ameliorations and repairs to the Montreal, Portland & Boston Railway Company, and if they were debtors, it was to him the debt was due. 5th. That an account was due from the South Eastern Railway Company, and that none having been rendered, there was no debt.

As regards O'Halloran's resignation as a director, we think there is sufficient to show that his resignation preceded the authorization of the declaration. Some irregularity did appear to have occurred in the entries in the minutes, with which O'Halloran is identified, but it was to correct and make the minutes conform to the actual proceedings, and that before being finally sanctioned.

I think the manner in which the lease was procured to be executed might have been subject to complaint if it had altered the relations of the parties to the prejudice of

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the intervenants. An old draft was taken applicable to the circumstances in which it was approved of in 1879, but inapplicable in some particulars to the circumstances when it was executed 3rd March, 1884. It had been suggested and intended to be executed as early as 1878. It had been approved as well by the directors as by the shareholders of the Montreal, Portland & Boston Railway Company on the 19th November, 1879, but its execution was, for the time, interrupted by legal proceedings, and the reason for perfecting it soon after became less pressing, as I shall endeavor to explain. The Montreal, Portland & Boston road was very imperfect, destitute of rolling stock, and incomplete. A controlling interest seems to have been held in it by the American Passumpsic River railway, in the name of Emmons Raymond, a director on both roads. He parted with that interest to Bradley Barlow, which enabled him by his vote to control the Montreal, Portland & Boston Railway, and to control its policy. The execution of the lease consequently became less necessary, but the road continued to be operated in like manner and much as if the lease existed. The South Eastern Railway and the Montreal, Portland & Boston Railway were operated by the same officials, and the earnings were used in making extensive repairs, ameliorations and extensions on the Montreal, Portland & Boston Railway. The accounts between the roads were kept by the South Eastern Railway Company. It is probable, and there is some reason for saying that when matters appeared to be coming to a crisis, Mr. Barlow having failed and left the country, and the prospects of the roads not improving, it no doubt being the interest and desire of Mr. O'Halloran to place on record something to show the relation in which the roads stood towards each other as debtor and creditor, he seems to have taken part in promoting the execution of the lease, which somewhat differed from the effect the lease would have had if executed at the time it was proposed. A blank left for the period of its duration was filled by the insertion of nine years, and it then applied to extensions

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not in existence at the time the lease was first proposed, but the manner of applying the earnings was not changed.

As respects the present controversy, the existence or non-existence of this lease would, I think, make no difference. The question is whether there was a debt due from the Montreal, Portland & Boston Railway Company to the South Eastern Railway Company, at the time the attachments were served, sufficient to cover the amount of the claims thereby made. Apart from the lease this is shown by the extent of the repairs, ameliorations and extensions made on the former road, and the accounts kept of the expenditures for the purpose, and other the liabilities of the former of these roads to the latter, in the books of the South Eastern Railway Company; the statements furnished by the last named company prepared by their auditor, submitted and approved of by the shareholders of the Montreal, Portland & Boston Railway Company, one being made up to the end of December, 1881, showing an indebtedness of $102,147.80, approved of by resolution of the shareholders of the Montreal, Portland & Boston Railway Company, passed 18th January, 1882; another showing the balance on the 31st December, 1882, to be $172,237,82, approved of by resolution of the shareholders of the last named company on the 17th January, 1883; by proof that the balance has increased since that date, and finally by the evidence of Mr. Riddell appointed by the Superior Court to examine the state of the accounts; and who finds the balance to be $186,681.19, thus exceeding by much the aggregate amount of the attachments. As to the pretension that the moneys for these ameliorations and augmentations were furnished by Barlow, it is contradicted by the whole circumstances of the time he controlled the management of the roads. This was done through the shares held in his name, but the expenditures and administration of the affairs were by and through the officers of the companies. The revenues were collected by them, the ameliorations were made by them, and the accounts kept by them. Mr. Barlow could deposit moneys to his own credit in the Bank of Montreal, but there was

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only one source whence they could proceed, that is, from the earnings of the roads. We consider that it is shown that a debt was due from the Montreal, Portland & Boston Railway Company to the South Eastern Railway Company, according to the declaration made by the last named company, and that the intervenants have not shown said declaration to be false. The three appeals must, therefore, be dismissed.

The Montreal, Portland & Boston Railway Company now petition to be allowed to make a new declaration. On an application to the Superior Court, they may possibly be able to make out a case to warrant a new declaration. As regards this Court and the stage of the proceedings at which the case has arrived, the application cannot be entertained; it is consequently dismissed.

Judgment confirmed.

Chapleau, Hall, Nicolls & Brown, attorneys for appellants.

M. S. Lonergan, (and subsequently) *Hatton & McLennan*, attorneys for garnishees.

O'Halloran & Duffy, attorneys for respondent, O'Halloran.

(J. K.)

September 22, 1876.

Coram DORION, C.J., MONK, RAMSAY, SANBORN, TESSIER, JJ.

DANIEL MUNRO,
(*Defendant in Court below*),
APPELLANT;

AND

JOSEPH MOISE DUFRESNE,
(*Plaintiff in Court below*),
RESPONDENT.

Promise of sale—Acceptance—Lapse of time.

The appellant, on the 28th July, by a writing, offered certain property to the respondent for $50,000; $8,000 of which to be paid cash on passing deed,—"this offer shall remain open to the 10th August next." The respondent sent a letter to the appellant on the 10th August stating that he accepted, but did not make any tender, or put the appellant *en demeure* to pass a deed.

HELD:—That it was the duty of respondent to put the appellant *en demeure* to pass a deed on or before the 10th August, and to tender the $8,000, and this not having been done, the offer, or promise of sale, became ineffective by lapse of time.

The appeal was from a judgment of the Superior Court, Montreal (JOHNSON, J.), April 30, 1885.

JOHNSON, J. (in Superior Court):—

This is a case of great importance to the parties, and though complicated with some details of difficulty, can be disposed of on the principles defining rights and obligations under promises of sale. These difficulties arise mainly from the plaintiff having set up in his declaration a subsequent sale from the defendant to another party, an averment that must have effect on the conclusions ordinarily taken in such cases. On the 28th of July, 1874, the defendant signed a writing in the following terms:—

SALE FROM MR. DANIEL MUNRO TO MESSRS. M. DUFRESNE.

Official Lot, No. 245, containing 2326 on 8746, Dorchester street.

Official Lot, No. 251, containing 2540 on 106 irregular Lag., Sydenham.
Official Lot, No. 255, containing 2010 irrregular, 24,301 Sydenham.
All English measure, with the buildings comprising manufactories and houses thereon erected.

At the charge by the purchaser to entertain the leases of the said houses in perceiving the rents of the occupiers of the same and to take possession immediately.

The lots of ground are commuted.

With the reserve by the vendor of the gaselier and bracket in house, office safe, clocks, desks, table and pictures, paper, books, looking-glass, square hinges, copying press, small engine for repairs, copper and tin in bars, pig iron, 3 cupboards, straw cutter, garden utensils, 2 coils of ropes, grand stone frame, gas pipe for engine, marked block for small engine, and safety valve, surfacing machine, nearly finished and sold, nails, glass, paint and brushes, morticing machine, stone slab, ball, wooden vises, iron vises, and old fly wheel at end of mill, one red horse and two harnesses, one buggy and sleigh, lot Canada plates and lead pipes and a few patterns belonging to others, one cart, all timber and wood, and all the furniture of his own house, and the right for the vendor to stay in his dwelling up to the 1st of May, without paying any rent.

PRICE.

$50,000.00
8,000.00 cash on passing the Deed of Sale.

$42,000.00
7,200.00 to be paid to Sir W. E. Logan at the terms of deeds, interest 6 per cent., payable yearly on the 1st May.

$31,800.00 Balance remaining due to the vendor, and payable by annual and consecutive instalments, of $6,000, interest 7 per cent. per annum, semi-annually.

And the said purchasers shall be obliged to make assure the buildings and premises for the balance due to the said vendor. This offer shall remain open to the 10th August next.

(Signed,) DANIEL MUNRO.

MONTREAL, 28th July, 1874.

The plaintiff in his declaration, after setting out this writing, avers an acceptance of it by him on the 10th of August; and then goes into a detailed statement of the subsequent acts of the parties, all finally resulting in the defendant's refusal to keep his promise. From the middle of August to the middle of September, the defendant remained in a state of protracted indecision as to the execution of an authentic deed of sale on various grounds, one of them being the absence of his legal adviser from

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town, until at last, on the 15th of September, the plaintiff notified him in writing that the pretext of his attorney's absence had been put an end to by his return, and required him to sign a deed of which he sent him a draft, consenting at the same time to await till the 7th at 11 a. m., then to meet at the notary DesRosiers. To this the defendant returned no answer, but kept the draft, and on the same day sold the property on the same terms to one Bélanger, the deed being registered on the 17th. It is further alleged that the deed to Bélanger was simulated, the property being worth more than the price expressed in the deed, and the plaintiff then avers that by the delay in executing a title, he suffered $2,000 damages, and that if he cannot get a title, he will suffer $30,000 more; and his conclusions are: 1st. That the defendant may be condemned to have the registration of the deed to Bélanger cancelled; 2nd. That he be condemned to execute a title to the plaintiff; 3rd. That in default of the defendant's doing so, in a time to be fixed, the judgment of the Court serve him for a title; 4th. That in default of cancelling the registration, and of giving possession to the plaintiff by reason of the impossibility of executing the judgment in consequence of the title and possession of Bélanger, the defendant be condemned to pay $30,000 damages, and costs.

The defendant pleaded first a general demurrer, which was dismissed. If it had been a partial demurrer it might have been maintained, for it is difficult to see how, in the face of the plaintiff's averment of a sale to Bélanger, and of his possession, the judgment of this Court can serve the plaintiff for a title in case of the defendant failing to give him one, unless Bélanger were brought into the case, and the deed to him set aside on the grounds of fraud and simulation alleged, which has not been done.

The second plea admits the writing of the 28th of July, not as evidencing a contract in case of acceptance, but only as a memorandum on which to base a project that was to remain open to both parties until the 10th of

August. That on that day the defendant went to the notary's office to execute the deed; but the plaintiff wanted one made, not to himself alone, but along with some associates; and moreover had not the money ready which was to be paid down by the terms of the writing, and the parties separated without any deed being then executed, and the defendant gave notice that the thing was at an end, and he would not sell at all. That the defendant never agreed to a sub-division of his hypothec, and considered the protest of the 12th August as a repudiation of the terms of the writing of the 28th of July; that, yielding to the plaintiff's solicitations, the defendant, about the 26th of August, consented to have a new deed drawn; that, on the 31st, he went with his attorney to the notary's office, where a deed was prepared, containing conditions to which he had never assented, such as an addition to the number of purchasers, a division of the vendor's hypothec, and certain terms as to the payment of the interest, which gave rise to some altercation, on which he finally withdrew from the bargain, and sold to Bélanger.

All these matters were the subject of proof before me for several days at the *enquête* and hearing sittings. The witnesses were many, but the facts that have a direct bearing on the case are few. The writing of the 28th of July is admitted by the defendant. Its terms are clear. The stipulation at the end of it, that the offer is to remain open till the 10th of August, is one in favor of the plaintiff only. The offer was to remain open for the purpose of acceptance only; and if the defendant's pretension is right, the acceptance on the 10th of August would have been useless, for there might have been nothing there to accept. The defendant, I have no doubt, desired to sell, but took a wrong course after the 10th of August. He evidently was under an impression that he had not sold until a deed was completed; but this is against all authority. All the difficulties about the terms of the title might have been cut short at once by putting the plaintiff *in mora* to sign a deed in conformity with the writing of

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the 28th of July; but this was never done, and when all their later disputes had ended, and the parties had failed to come to new terms, the obligation under the first writing still remained where it was, and could not be terminated at the will of the defendant alone. It is sufficient for the plaintiff to show that the contract exists, and the defendant must show how it has been annulled. He cannot annul it himself.

The whole of this case, as regards the facts, seems to be that after the writing of the 28th of July, the defendant being under an impression that he had not made a sale, but that the contract was still incomplete without a deed; and being still anxious to sell, neglected the only proper course of liberating himself, and embraced the first opportunity that offered to sell to another, without bearing in mind the old precept, good in law as well as in other things, that it is well to be off with the old customer before being on with the new.

With respect to the law, the only question to be looked at is whether the writing of the 28th of July, subject to acceptance, became a complete contract when that acceptance was given. I am of opinion that upon such acceptance the contract was complete. The fundamental principle in such cases is, to use the words of Troplong in note No. 2 to article 18 of his *Traité du Contrat de Vente*: "*Le simple consentement même verbal suffit dans la vente.*" He gives this as the opinion of all the writers on the text of the institute *de fide instrum.*, upon the question whether the intention of the parties to execute a deed subsequently, made the existence of the contract dependent on such deed. The whole subject is treated by Troplong in two or three succeeding numbers, to which it is unnecessary to refer at length now; but nothing can be clearer both on principle and authority, than that when the parties make a private writing like this, containing the expression of their will upon the thing, and upon the price, and agree also, as they did here, that an authentic deed shall be executed thereafter, the private writing does not for all that remain a simple project or proposition. Trop-

long cites the opinion of Portalis on this head: "*L'acte "sous seing privé n'est pas pour cela un simple projet. On "promet seulement d'y ajouter une forme authentique: mais le "fond du contrat demeure toujours indépendant de cette forme. "La rédaction d'une vente privée en contrat public ne peut être "réputée essentielle, qu'autant qu'il aurait été déclaré par les "parties que jusqu'à cette rédaction leur premier acte demeurerait "un simple projet.*" The distinction between sales, and mere promises to sell is very plainly put by Pothier, No. 477. All that is necessary to complete the contract of sale is that it should clearly appear such was the intention of the parties. Here a man offers a thing for sale; if the offer had been accepted then and there, there could be no question about the completion of the contract at all. Instead of that, he says to the other: "You need "not accept to-day; you may do so on or before the 10th "of next month." Within the time the other party does accept, and, of course, that is the same thing as if he had accepted at first, and the contract is complete.

As regards the conclusions of the present demand, the averment that Bélanger is in possession under a deed, precludes a condemnation against the defendant to execute a title to the plaintiff while that of a third party subsists, and he is not called into the case to have it set aside. It also precludes a condemnation to cancel the registry. But, as regards the damages, the judgment must go for the plaintiff. The principles upon which these damages are to be assessed are fixed by Pothier, and reproduced in the Code, (Art. 1073) and are the amount of the loss he has sustained, and the profits of which he has been deprived. These are limited, except in case of fraud, which is not in question here, to what might have been foreseen at the time of contracting the obligation. In the present instance, they are fixed by evidence of great precision and unanimity, and I have really no discretion to exercise. First, then, with respect to the land. The value by the foot is fixed by the witnesses Simard, Crevier, Perrault, Lamoureux; Alfred Roy, Duclos and Victor Roy value the land alone at $31,053.10. The buildings

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they value at $29,735.53. This is taking an average as to the value of the land from 40 cents to 50 cents a foot, which is the extent of variation of opinion. Then come the defendant's witnesses, who do not really reduce this value, for they admit the perfect competency of the plaintiff's witnesses, and though two of them—Robert and Morin—value the land at 30 cents, they know of no sale at that price, and admit a very large increase in value during the last two years. Then with respect to the machinery, the result of all the evidence on both sides, is that it is to be valued at $12,874. This brings the total value of land, building, machinery, etc., to $73,635.63, from which is to be deducted the price of sale, viz., $50,000, and the balance of $23,635.63 remains due as damages.

The judgment of the Superior Court was in the following terms :—

"The Court, etc.....

"Considering that, on the 28th day of July, 1874, at the city of Montreal, by a writing produced and filed in this cause by the plaintiff, as his exhibit No. 1, the defendant offered, undertook and promised to sell to him, the said plaintiff, the moveable and immoveable property mentioned and described in the said plaintiff's declaration, for the price and upon the terms and conditions in the said writing expressed, and amongst others, that the said promise and undertaking and offer should remain open for the acceptance of the plaintiff, until the 10th day of August then next;

"Considering that on the said 10th day of August, the said plaintiff did accept and agree to the said offer and promise;

"Considering that the effect of the said offer, undertaking and promise of the defendant, and of the said acceptance thereof by the plaintiff, was to complete a contract of sale of the said moveable and immoveable property, between the said parties upon the terms and conditions in the said contract expressed; one of which was that $8,000 were to be paid by the plaintiff, at the passing of the deed of sale mentioned in the said writing, and

evidently contemplated by both parties, in case of acceptance as aforesaid;

"Considering that on the 12th day of August aforesaid, the plaintiff duly notified and required the defendant to execute and fulfil the conditions of his said contract, which the defendant, however, neglected and refused to do, and still neglects and refuses to do, although the plaintiff was and is ready and willing to perform his part thereof;

"Considering that subsequently, to-wit: on or about the 15th day of September, 1874, the said parties met for the purpose of executing a deed of sale, but separated, without such deed having been executed, the defendant then and there declaring that he would not sell;

"Considering that such determination, on his part, could not liberate him from the obligation of executing a deed upon the conditions stipulated in the offer and promise of the 28th of July aforesaid, and the acceptance thereof, which together constituted a contract of sale;

"Considering that the defendant has never notified or required the plaintiff to take, or on his part execute a deed of sale;

"Considering that the said plaintiff has proved all the essential allegations of his demand; but that it appears by the evidence, as well as by the terms of the plaintiff's declaration, that the moveable and immoveable property aforesaid was, on the 15th day of September, 1874, sold by the said defendant to Narcisse Bélanger, who is in possession thereof as proprietor, and that the deed of sale thereof, to the said Bélanger was duly enregistered on the 17th of September, 1874, and that therefore the defendant cannot execute a title in favor of the plaintiff, nor can the judgment of this Court, under the circumstances, serve or avail him for or instead of a title, nor can the plaintiff compel the discharge or cancellation of the registration of the said deed to Bélanger, without putting into the cause the said Narcisse Bélanger;

"Considering that the defendant has not established by evidence the allegations of his plea of peremptory excep-

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tion, doth dismiss the said plea; and considering that the demand and conclusion of the plaintiff for damages is well founded, and that it is established by the evidence of which the notes are of record, that the damages to which the plaintiff is entitled by law, are $23,635.63, to-wit: that the value of the land is $31,053.10, that the value of the buildings is $29,735.53; that the value of the moveable property is $12,874, making the total value of all the property, moveable and immoveable, sold, $73,-635.63, from which is to be deducted the price of sale stipulated by the said writing of the 28th day of July, 1874; leaving the said sum, or balance, of $23,635.63, due by the defendant to the plaintiff, for the causes, matters and things in the plaintiff's declaration set forth,—doth adjudge and condemn the defendant to pay and satisfy to the plaintiff the said sum of $23,635.63, with interest from this day, and costs of suit, *distraits*, etc."

E. U. Piché, Q.C., for the appellant :—

Si l'intimé, avant son action et en temps et lieu, eût, par une dûe mise en demeure, et notamment par des "offres réelles," légalement constatées, requis de l'appelant, la réalisation, (non de ce que celui-ci n'avait pas offert, ni promis), mais seulement, de ce qu'il avait vraiment offert ou promis, l'intimé eût été alors recevable à intenter une action, à l'effet de forcer l'appelant à lui passer un titre de vente, suivant les conditions de la promesse, et qu'à défaut par lui de ce faire, le jugement de la Cour équivaudrait à tel titre.

Mais, dans ce cas-là, il eût fallu que l'intimé renouvelât par son action, ses offres réelles, qu'il en demandât acte, et qu'il en consignât le montant en justice (Code Proc. Civ., B. C., arts. 538, 539, 542.)

En concluant comme le fait, l'action de l'intimé, à un jugement équivalant à un titre passé devant notaire, et lui transférant les propriétés en question, c'était demander à la Cour de se substituer à cet officier, à ce notaire, qui, certainement, n'aurait pu parachever un tel contrat de vente et y apposer sa signature avant que l'acheteur eût

mis, à sa disposition, l'argent du prix de vente, pour le remettre ou livrer au vendeur.

L'intimé devait donc, pareillement, mettre la Cour en état d'en faire autant, au moment où elle aurait été prête à prononcer un jugement, équivalant à un titre, ou contrat, transférant, *instanter*, à l'acheteur ou à l'intimé, la *propriété* des biens veudus.

Or, il n'y avait qu'un moyen de mettre la Cour dans cet état, c'était de la saisir, (en les consignant ou déposant au "Greffe") des deniers du prix de vente. C'est ce que n'a pas fait l'intimé.

S. Pagnuelo, for the respondent :—

Il n'y a pas dans notre droit de dispositions plus claires et plus formelles que celles qui déclarent que : 1o. "La vente est parfaite par le seul consentement des parties, quoique la chose ne soit pas encore livrée." *C. C. Art.* 1472.

2o. Ce consentement peut n'être que verbal. I *Troplong, vente*, No. 18, et note à la p. 29. Nos. 19 et 20.

3o. Il peut se donner par lettre ; *do.* No. 21.

4o. La vente est parfaite du moment que la réponse est donnée et reçue ; *do.* No. 22.

5o. L'offre de vente du 28 juillet ayant accordé délai jusqu'au 10 août, pour l'acceptation de l'intimé, ne pouvait être rétractée que ce délai expiré, et l'acceptation faite verbalement chez le notaire Simard, et par écrit le 10 août a rendu la vente parfaite à partir de ce moment.

6. *Toullier*, No. 30.

6o. "L'entente qu'il sera passé acte devant notaire d'un "marché ne fait pas dépendre de cet acte la perfection du "marché,"..... "parce qu'on ne pouvait pas conclure de "cette clause seule que les parties eussent voulu faire "dépendre de l'acte devant notaire la perfection de leur "marché."—Ce sont les propres expressions de *Pothier, Obligations*, No. 11 ; 1 *Troplong, vente ;* No. 18, *note ;* No. 19.

7o. La vente étant ainsi parfaite par la lettre d'acceptation du 10 août, et par la convention du 25 août, chez M. Charles Thibault, renouvellée les jours suivants à Lachine, Ste-Anne, et chez le notaire Desrosiers, aucune

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partie ne pouvait s'en dédire sans le consentement de l'autre, ou sur défaut d'exécuter la vente après une mise en demeure régulière.

La mise en demeure consiste "dans une interpellation en justice, ou une demande qui doit être par écrit, à moins que le contrat lui-même ne soit verbal." *C. C. Art.* 1065, 1066, 1067, 1473.

DORION, CH. J.:—

On the 28th of July, 1874, the appellant Munro gave the respondent Dufresne a writing entitled, "Sale from Daniel Munro to M. Dufresne." It was in effect a promise of sale by which Munro bound himself to sell to Dufresne certain property therein described, for the sum of $50,000, of which, $8,000 was to be paid in cash on passing the deed, if Dufresne accepted the offer on or before 10th August. The parties went to the office of the notary on the 10th August, but Simard, who was to have joined in the purchase, would not come in, and Dufresne had not the funds to produce. They separated, and about five o'clock in the afternoon, Dufresne sent a letter to Munro, in which he stated that he accepted the offer made on the 28th July, and would be ready to pass the deed.

The first question is this,—was this letter a sufficient acceptance of the promise of sale, to be binding on Munro? Was it sufficient that on the 10th of August Dufresne should say, "I accept your offer?" Or was it necessary that he should be ready to fulfil the conditions of the deed?

There is no difficulty as to the proposition, that when a delay is fixed, the expiration of the delay is fatal if no acceptance of the offer has been made on or before the day fixed. There is no necessity for a *mise en demeure* if the party does not accept on the day mentioned. The only question then, is, what is the meaning of the promise of sale? As I have remarked, on the 10th August the money was not forthcoming. There was nothing, then, in the nature of an acceptance, except the letter which Dufresne took the precaution of writing to Munro

in the afternoon. Subsequent to that, there were several *pourparlers*, but in none of these does it appear that Dufresne had the $8,000 ready. Under these circumstances he brings his action, asking that Munro should pass a deed to him. It is in evidence that Munro subsequently sold the property to a man named Bélanger for the same price. Dufresne asks that Munro should have the deed to Bélanger set aside, and convey the property to him; or that the judgment should hold as a title to the property; and if the property cannot be conveyed, that Munro be condemned to pay him $37,000 damages. The parties went to evidence, and the judge in the Court below held that Munro was bound by the acceptance contained in the letter of the 10th August.

The question, then, presents itself, was Dufresne bound to put the vendor *en demeure* to give him a deed on that day, failing which, was he entirely debarred from any claim in respect of the property? The Court holds that the meaning of an acceptance was not merely to send Munro word that he would accept, but a complete acceptance, and that it was for Dufresne to put Munro *en demeure* to fulfil his obligation on the 10th August, and to tender the $8,000. This not having been done, we hold that Dufresne's right completely lapsed on that day. Taking this view of the case, we have come to the conclusion that the judgment must be reversed, and the action dismissed.

RAMSAY, J.:—

The first question is as to the effect of the writing of the 28th July. It is an offer to sell certain property up to a certain date. There is no doubt that if the plaintiff did not close with defendant, and accept his offer before the expiration of the time to which the offer was open, obligation ceased. It seems equally clear that if there is valid acceptance within the period fixed the offer binds. What constitutes an acceptance? It is contended that there is some difference between an offer to sell and a promise to sell. That the one is unilateral and the other

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synallagmatique. There seems to be no such distinction (Pothier, Vente, 478). Pothier also distinguishes *Promesses de vente* into two kinds—1. *avec limitation de temps*; 2nd. *sans limitation de temps* (Ib. No. 480). He says: "Lors-"que quelqu'un s'est obligé de rendre une chose dans un "temps limité, il est déchargé de plein droit de son obli-"gation par le laps de ce temps, si pendant l'espace de "ce temps il n'a pas été mis en demeure de s'en acquitter."

In what consists demeure? "Pour faire déclarer les "offres d'un débiteur bonnes et valables, trois circonstan-"ces sont requises, savoir, de la chose, du lieu et du temps. "De la chose, que l'offre soit réel et non labial, car les "seules paroles ne rendent point un créancier coupable "de négligence, et ne le constituent point en demeure, si "le corps de l'argent ne s'offre réellement."

The question is important in this case, for on the evening of the 10th, last day of the term given to the plaintiff to purchase, he notified defendant by letter that he accepted the offer. This was not sufficient; he should have tendered the price to be paid cash and the deed, and therefore the bargain was at an end.

Later, on the 12th, the plaintiff protested defendant and summoned him to take a deed, to which defendant paid no attention. On the 15th, plaintiff wrote to defendant asking him to sign the deed, but to this appeal defendant was equally deaf. It seems, however, that other negociations took place, and that defendant even went to the notary's about the deed, and there he refused to sign it and went away declaring he would not sign. Notwithstanding, Mr. Desrosiers went with a clerk and tendered defendant deed No. 5, and offered him $8,000. He would not even look at the money, and refused to have anything to do with it. Subsequently some one, not the notary, sent him a deed purporting to be a copy of the draft Mr. Desrosiers made, but which was really not a copy. This action was then brought. Now if the obligation contained in the offer to sell of the 28th July was determined by the failure to put defendant *en demeure* legally, we have to look for the evidence of the new transaction in

the testimony of the witnesses, and I have been unable to find any satisfactory proof of such new contract. It is true, Munro gave his title deeds to Mr. Desrosiers, but he gave him no instructions. Desrosiers swears to no bargain, and the deed when prepared was at once objected to. Neither Dubord nor Simard prove anything but *pourparlers*. There was a constant shuffling even as to the purchasers—it was Dufresne alone, Dufresne and Simard, and then Dufresne and Campbell. It is very probable that the withdrawal of Simard from the transaction was a significant hint to Munro, and it certainly dissolved any obligation Munro may have entered into after the 10th August till then. It seems to me that we have nothing but a very feeble presumption that Munro entered into a new contract with Dufresne after the 10th, and it must have been of a very loose kind indeed, since it appears Dufresne thought it extended to Mr. Campbell and to the sub-division of the *bailleur de fond* hypothec. But perhaps these considerations are of little moment, for the plaintiff has a very formidable difficulty in his way in the fact that the very important formality of producing the $8,000 with the action has been neglected. The $8,000 Mr. Desrosiers had with him, in what shape we are not told, are not now forthcoming. But our attention has been directed to the case of *Perrault* v. *Arcand*, (1) decided by the Superior Court at Quebec, and in which it was held that if it appeared by the record that the defendant could not give the land, plaintiff was not obliged to bring the money into Court. There is no authority cited in support of this decision, and Mr. Justice Meredith dissented, giving full reasons for his dissent. This very term we have decided that the actual offer of the money was required to put *en demeure*, and this in a case where the defendant had pleaded other grounds of defence.

It was also urged that it appearing by the record that defendant has sold the land, plaintiff might sue in damages. He did not sue for damages alone, and this might be of importance; but it is unnecessary to enter more

(1) 4 L. C. R. 449.

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fully into the question, as the Court holds that there was no evidence of the renewed promise of sale.

MONK, J.:—

I concur in the judgment. The learned Chief Justice has so fully expressed the grounds of the decision as I understand it, that it is unnecessary for me to do more than express my entire concurrence in the observations which have fallen from him.

SANBORN, J.:—

I also concur in the judgment as delivered by the Chief Justice.

The judgment in appeal was as follows:—

"La cour, etc.....

"Considérant que par écrit du 28 juillet 1874, l'appelant s'engagea de vendre à l'intimé les immeubles y désignés pour $50,000 courant, dont $8,000 seraient payés en passant le titre, s'il acceptait cette offre du dit jour au 10 août suivant (1874) inclusivement;

"Et considérant que l'intimé n'a pas, avant le 11 août 1874, offert de payer les $8,000 qu'il devait payer en passant l'acte de vente, ni n'a régulièrement mis l'appelant en demeure de lui passer titre;

"Et considérant que par le seul laps de temps, l'appelant a été déchargé de sa promesse de vente;

"Et considérant qu'il n'y a pas de preuve d'aucune prolongation de délai, après le 10 août 1874;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal, le 30me jour d'avril 1875;

"Cette Cour casse et infirme le dit jugement du 30 avril 1875, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, elle renvoie l'action de l'intimé, et condamne l'intimé à payer à l'appelant les dépens encourus tant en cour inférieure que sur le présent appel."

Judgment reversed.

E. U. Piché, Q.C., attorney for appellant.

S. Pagnuelo, attorney for respondent.

(J. K.)

May 19, 1888.

Coram DORION, C.J., TESSIER, CROSS, CHURCH, JJ.

ROBERT MITCHELL ÈS-QUAL.,
(*Defendant in Court below*),
APPELLANT;

AND

JOHN MITCHELL ET AL.,
(*Plaintiffs in Court below*),
RESPONDENTS.

Removal of executor—C. C. 917, 282, 285.

HELD:—(Reversing the judgment of the Court of Review, M. L. R., 3 S. C. 31), that the existence of a law suit between one executor and the estate he represents, especially when there are several executors, is not a sufficient cause for the removal of such executor.

2. Art. 282, C. C., does not apply to executors chosen by the testator.

The appeal was from a judgment of the Court of Review, reported in the Montreal Law Reports, 3 S. C. 31, unanimously reversing the judgment of the Superior Court, rendered by Mr. Justice Loranger.

The action was taken to remove the appellant from his position as executor of the estate Alexander Simpson. The respondents, who were legatees under the will of the said Simpson, set forth in their declaration the making of the will, the death of the testator, and the beginning of the administration of the appellant with his co-executor Alexander Mitchell. The first ground of removal charged was connected with the taking of the inventory made after the death of the executrix on the 14th September, 1883. Among the assets entered in the inventory was a debt due by the succession of Dame Eliza Lane Rose, wife of the appellant. The debt was then entered as $3,876.30. Another asset was $280, amount of an overdue note made by the appellant. It was charged that he withheld and suppressed information respecting the debts; that his co-executor subsequently discovered that the capital debt

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due by the estate of Dame Eliza Jane Ross was $5,455.72, and that no interest had been paid since 1st May, 1878, excepting $200.90, making an additional sum of $1,770.16 due for interest on the day of the death of the executrix, Catherine Ray; that said Robert Mitchell had admitted said indebtedness by several documents concealed from his co-executor; that the said Eliza Jane Ross died on the 14th October, 1880, leaving a will whereby she appointed her husband the appellant, her son James M. Mitchell, and her daughter Eliza J. R. Mitchell, the executors of her will; that said executors, refusing to pay the said indebtedness to the estate of said Simpson, an action, No. 1219, was begun by the Simpson executors, including the appellant, against the said Robert Mitchell and his son, and daughter, as executors of the will of Mrs. Mitchell; that the now appellant then refused to give the address of his said daughter, in order that she might be served in said action; that pleading to the merits of said demand, the then appellant, including the now appellant, pleaded that the obligation of indebtedness set forth against the said executors was entered into by Mrs. Robert Mitchell without consideration to herself, and that she received no benefit therefrom from the estate A. Simpson (though the deeds purport to be for value from said estate), and that said Robert Mitchell alone received consideration therefor, and that said deeds were made by Mrs. R. Mitchell as security for the debts of her husband; and said deeds were null; the now respondents say that said deeds were made by Mrs. Simpson with the knowledge and assistance of the appellant; that appellant was entitled under the will of said Simpson to one —twenty-second part in his said estate, but transferred the same on 9th April, 1881, to his daughter, and she the same day transferred the same to her brother by deed dated 21st May, 1881, which latter deed appellant concealed from his co-executor; that Robert Mitchell concealed the fact of his owing the Simpson estate the said sum of $280, and afterwards averring that the same had been assumed by his daughter and secured by her on

mortgage, refused to specify the property on which it was secured.

The respondents, afterwards, on the 8th September, 1884, presented an incidental demand, giving another reason for the deprivation of the appellant of his office of executor, namely, that he impeded the gestion of the Simpson estate by endeavoring to prevent the prosecution of the suit against the Ross estate to recover the amount of its indebtedness to the Simpson estate, by writing a letter to the attorney *ad litem* of the Simpson estate, purporting to withdraw his authority as such attorney, following up the same by a notarial protest against said attorney. Again, on the 8th April, 1885, respondents filed another incidental demand, alleging as another motive for the deprivation of the appellant of his office of executor, that the now appellant, in the cause 1219, on the 17th March, 1885, after judgment rendered therein against the Ross estate for the sum of $7,200, with interest, etc., further obstructed the administration of the Simpson estate by filing with the prothonotary, without right or the concurrence of his co-executor, and to the detriment of said estate, a renunciation of part of said judgment, namely, the sum of $1,920.80.

Delisle, and *Geoffrion*, *Q.C.*, for the appellant :—

The proof was not such as to bring the appellant within the provisions of C. C. art. 285, to which art. 917, C. C. refers. Art. 282, C. C., does not apply to executors, but to tutors only.

N. T. Rielle for the respondents :—

The words of C. C., art. 917 : "If having accepted, a tes-"tamentary executor..... exercise his functions in such a "manner as would justify the dismissal of a tutor..... he "may be removed by the Court having jurisdiction," make both articles 282 and 285 applicable. Consequently the existence of a law-suit for a large amount, between his wife's estate and that of Alex. Simpson, was sufficient to justify the respondent's demand. The appellant's conduct had also been such as to justify his removal under art. 285.

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Respondents' authorities :—C. N. 444 ; Nouveau Denizart, *Vbo.* "Exécution Testamentaire," vol. VIII, p. 213 ; Dalloz et Verge, Codes annotés (under art. 444, C. N.), Nos. 3, 24, 25, 28 ; Toullier, vol. II, No. 1165 ; Demolombe, vol. VII, No. 489.

TESSIER, J. :—

Il s'agit d'une action en destitution de Robert Mitchell comme exécuteur testamentaire de feu Alexander Simpson.

La Cour Supérieure en première instance a débouté l'action.

La Cour en révision a maintenu l'action.

Les faits sont bien expliqués dans les factums des parties.

Le jugement *a quo* paraît assimiler parfaitement la position d'un exécuteur testamentaire à celle d'un tuteur. Il y a une différence essentielle, en ce que l'exécuteur testamentaire est choisi par le testateur et son libre choix doit être respecté, à moins qu'il y ait des motifs d'une très grande force pour le mettre de côté. Il en est autrement du tuteur ; il est choisi par une assemblée de parents sous le contrôle du juge, et l'article 282, C.C. prononce l'exclusion absolue du tuteur ; il ne peut être nommé s'il a un procès pendant avec le mineur.

Mais cela peut-il *ipso facto* rendre nulle la nomination d'un exécuteur testamentaire ?

Il faut donc rechercher dans les faits prouvés et la conduite de l'exécuteur testamentaire dans la présente cause une preuve suffisante pour justifier sa destitution.

Le juge en première instance a fait l'appréciation de ces faits et les a trouvés insuffisants pour justifier la destitution. Il y a eu des irrégularités, mais non pas de celles qui dénotent dans les termes des articles 917 et 285 C. C., *une inconduite notoire*, ou l'*incapacité*, ou la *malhonnêteté*.

L'appelant Robert Mitchell est lui-même l'un des légataires ; ils sont au nombre de vingt-deux ; sur ce nombre les demandeurs intimés ne représentent que 5-22ème parties de la succession. Toutes les parties intéressées ne devraient-elles pas être en cause ?

Les faits particuliers fondés sur certains calculs, le désaveu de l'avocat, le retraxit qui ne pouvait avoir d'effet préjudiciel, le refus de l'appelant de donner l'adresse de sa fille ont été expliqués, et je n'entrerai pas dans le détail de ces différents points dans ces notes. Il m'a paru qu'aucun de ces faits ne justifiait la destitution de l'appelant que le testateur a librement choisi. Pour motiver une destitution dans ce cas-ci, il faut des faits conclusifs de *malhonnêteté* ou de *méconduite*. Cette Cour est d'avis que le jugement en première instance était bien fondé en droit et en fait, et c'est celui-là qui est maintenu. Ce jugement dispose des autres objections, de l'omission de certains montants dans l'inventaire des biens, de prétendus actes de fraude. La fraude ne se présume pas, or la preuve est insuffisante pour établir ces prétendus actes de fraude. En somme il n'est pas établi que la succession ait rien perdu par la faute de l'appelant ni que celui-ci soit insolvable.

Pour ces raisons je suis d'avis de renverser le jugement en révision et de maintenir celui rendu en première instance. C'est là l'opinion unanime de cette Cour.

DORION, C. J.:—

This Court differs from the opinion of the Court of Review as to the applicability of C. C. 282. The Court of Review held that under the provisions of art. 917, art. 282 applies to executors. That is not the view taken by this Court. I am also personally of opinion that the action could not be brought by the respondents alone, but required the presence of all the legatees of the estate Simpson.

The judgment of the Court was as follows:—

"Considering that the respondents, plaintiffs below, have failed to establish the material allegations of their declaration, and more particularly that they have not shown that the defendant, now appellant, has been guilty of any misconduct in the discharge of his duties as one of the executors named in and by the last will and testa-

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ment of the late Alexander Simpson to justify his removal from the said office of executor ;

" And considering that article 282 of the Civil Code, cited in the judgment rendered by the Superior Court sitting in review on the 30th of November, 1886, does not apply to executors chosen by a testator, and that the existence of a law-suit between one executor and the estate he represents, specially when, as in the present case, there are several executors, is no sufficient cause for the removal of such executor ;

" And considering that there is error in the judgment rendered by the Court of Review on the 30th of November, 1886 ;

" This Court doth reverse and annul the said judgment of the 30th of November, 1886, and proceeding to render the judgment which the said Court of Review ought to have rendered, doth affirm the judgment rendered by the Superior Court of Montreal on the 27th February, 1886, and dismiss the action of the said plaintiffs, now respondents, with costs as well in the Superior Court and in Review as in the Court here, etc."

Judgment of C. R. reversed.

A. Delisle, attorney for appellants.
Geoffrion, *Q.C.*, counsel.
Lafleur & Rielle, attorneys for respondents.
(N. T. R.)

June 20, 1888.

Coram DORION, CH. J., TESSIER, CROSS, CHURCH, JJ.

PIERRE CLAUDE,
(*Defendant in Court below*),
APPELLANT;

AND

DAVID WEIR,
(*Plaintiff in Court below*),
RESPONDENT.

Long established industry—Tannery—Pollution of running stream—Nuisance—Injunction.

The appellant and his predecessors had, from time immemorial, carried on the business of tanning leather in Côte des Neiges,—that being the principal industry of the village. A small stream, which ran through the lands of both parties, and which was partly used as a drain, received certain noxious substances from the tannery. The respondent, who had, within a few years, acquired a lot ten or fifteen arpents lower down,—and with knowledge of the industry long established in that place,—complained of the pollution of the stream by the substances from the tannery, and asked for an injunction. There were other proprietors between the parties, but the respondent alone complained of the nuisance. The effect of the injunction, if granted, would be to destroy the principal industry of the locality.

HELD:—(Reversing the judgment of the Superior Court, M. L. R., 2 S. C. 326), that the appellant was not entitled to the injunction.

The appeal was from a judgment of the Superior Court, Montreal (JOHNSON, J.), October 30, 1886, granting an injunction. The case in the Court below is fully reported in Montreal Law Reports, 2 S. C., p. 326.

The *considérants* of the judgment rendered by the Court below are as follows:—

"Considering that the plaintiff's action is brought to recover damages and also to get a restraining order and injunction against the defendant for that he, the defendant, has deteriorated the water of a certain stream in the declaration described, and running through the lots of land owned and occupied by both parties—the defen-

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dant's lot being above that of the plaintiff; and that it is alleged by the plaintiff that the defendant has upon his, the defendant's said lot, a tannery wherein he carries on the processes of tanning and colouring leather; and that in prosecuting his business, as aforesaid, he uses substances which he suffers to get into and mix the said stream, whereby the water thereof is rendered unserviceable to plaintiff, who has a house upon his said lot wherein he dwells with his family; and is further rendered noxious and offensive to the smell, as well as poisonous and dangerous to drink;

"Considering that the defendant pleads in substance that he and his predecessors have from time immemorial used the said stream for the purposes of a tannery with the consent of the inhabitants generally, and the plaintiff's predecessors in particular; that the said stream is more polluted by others than by him, the defendant; that the plaintiff acquired his property with a perfect knowledge of all that he complains of by his action, and that he, the defendant, makes a lawful use of the said stream;

"Considering that the plaintiff demurs to the said plea, and that his demurrer has been reserved for decision until after proof made;

"Considering that the allegations in the said plea, to the effect that the defendant made only a lawful use of the said stream, are sufficient to save it from dismissal under the demurrer; which latter is therefore dismissed;

"Considering that on the merits the plaintiff's case is sufficiently and conclusively proven, and that by law he has a right to the use of the said water without any diminution, hindrance or deterioration whatsoever at the hands of others; and that the said stream in its natural state and the waters thereof are his, to use for domestic and other purposes fully and without molestation;

"Considering, therefore, that it is proved that the defendant makes an unlawful use of the said stream to the damage of the plaintiff, the Court assesses the said damage at $500, and condemns the defendants to pay and satisfy the said sum to the plaintiff; and doth further order and

enjoin the said defendant to cease all manner of injury and annoyance to the plaintiff in respect of the matters and things in and by the said action complained of, under all the penalties of law, and doth also condemn the defendant to pay the costs of this action, *distraits*, etc., and doth condemn the plaintiff to pay the costs of the said demurrer, *distraits*, etc."

March 15, 1888.]

L. O. David, for the appellant :—

Le motivé du jugement de la Cour inférieure peut se résumer dans la proposition suivante :

Le défendeur fait un usage illégal des eaux du ruisseau de la Côte-des-Neiges ; il les salit et les corrompt au détriment du demandeur qui a droit à la jouissance de ces eaux sans molestation, ni diminution.

Nous prétendons que le jugement est mauvais pour les raisons suivantes :

1o. Parcequ'il est prouvé que l'intimé ne souffre pas plus que les autres habitants de la Côte-des-Neiges des inconvénients résultant de l'établissement des tanneries à la Côte-des-Neiges ; qu'aucun dommage réel et spécial n'a été prouvé, et qu'à défaut de cette preuve, il n'a pas droit d'action. C'est à la communauté ou à la corporation à agir en pareil cas. Un simple individu n'a pas le droit de changer toutes les conditions d'existence d'une communauté.

Autorités sur ce point : Allen's Reports, vol. 13, page 103. Bigelow, *Leading Cases*, page 465. Addison, *Law of torts*, page 33, édition de 1874.

2o. Il est prouvé que les premiers habitants de la Côte-des-Neiges étaient des tanneurs et que, de tout temps, les eaux du ruisseau, à cet endroit, ont été consacrées à l'usage des tanneries ; que c'est l'industrie principale de cette paroisse, la seule même, et que sans elle la Côte-des-Neiges serait à peine habitée. Or, les auteurs disent que lorsque certains endroits sont consacrés de temps immémorial à certaines industries, il y a droit acquis en faveur de ces industries et ceux qui vont s'établir en ces endroits

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doivent subir les inconvénients d'une situation qu'ils sont réputés avoir connue et acceptée.

Daviel, vol. 2, pp. 416, 417 et 411 ; Pardessus, *Servitudes*, vol. 1er, p. 130, Nos. 54, 65, 86 et 91 ; Macarel, *Ateliers dangereux*, p. 16.

3o. Il est prouvé aussi que de tout temps le ruisseau a servi d'égout, par la volonté et le fait de tous les habitants de la Côte-des-Neiges ; que l'intimé lui-même et ses auteurs ont participé et acquiescé à la faute commune. Or, les auteurs disent qu'en pareil cas c'est la communauté et non un individu qui a droit d'action. Il faut s'adresser à la communauté : à la corporation qui seule a le droit d'intervenir.

Addison, *Law of torts*, p. 117 ; Cooley, pp. 46 et 47 ; Marcadé, vol. 7, p. 367.

4o. Il est prouvé que l'intimé ne peut prétendre que les eaux du ruisseau sont plus gâtées qu'autrefois, puisque les substances dont les tanneurs se servent maintenant sont toutes inoffensives ou ont pour effet de désinfecter les eaux du ruisseau gâtées et corrompues par les saletés et les fumiers qui y tombent de partout et que tout le monde y jette. Une seule substance serait dangereuse, mais il est prouvé qu'elle ne tombe pas dans le ruisseau et de fait on ne l'y a pas trouvée.

5o. Les progrès de l'industrie, la faveur qui doit être accordée à tout ce qui peut lui être utile, les avantages immenses que ces établissements procurent au public en général, font un devoir aux tribunaux de ne pas favoriser un individu à cause d'inconvénients résultant de ces établissements, au détriment de toute la communauté à laquelle cet individu appartient.

Les autorités ne manquent pas à l'appui de cette proposition. Voir en particulier Dalloz au mot *Eaux*, 1856, 2, 294 ; Marcadé, vol. 7, p. 354, no. 297 ; Pardessus, *Servitudes*, vol. 1er, p. 130 et par. 65, 86, 91.

6o. Pour exécuter le jugement tel qu'il est, l'appelant serait obligé de fermer son établissement ; car le jugement ne spécifie pas ce qu'il doit faire, il n'ordonne pas que l'appelant prenne les moyens d'empêcher telles ou telles

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substances de tomber dans le ruisseau. Et, cependant, la Cour inférieure n'a pas voulu évidemment obliger l'appelant à fermer son établissement. Cela fait voir la sagesse des auteurs plus haut cités qui disent qu'un individu auquel un établissement industriel ne cause aucun dommage spécial n'a pas de droit d'action, que ce droit appartient à la communauté. La conséquence est que, dans le cas actuel, l'intimé aurait dû prendre les moyens de forcer l'autorité municipale à intervenir et à ordonner à l'appelant de faire ce qu'elle aurait cru nécessaire pour éviter les inconvénients dont il se plaint. Si la communauté ne veut pas intervenir, c'est qu'elle trouve les inconvénients insignifiants, comparés aux avantages résultant de l'existence des tanneries à la Côte-des-Neiges.

7o. Dans tous les cas, l'intimé n'a droit à aucun dom mage, car il n'a pas établi qu'il en avait éprouvé, et le jugement qu'il a obtenu ordonnant à l'appelant de ne plus corrompre les eaux du ruisseau, est trop vague et trop général pour pouvoir être exécuté.

Si ce jugement était maintenu, ce serait la ruine de l'appelant, de tous les manufacturiers et tanneurs placés dans les mêmes conditions, et de la Côte-des-Neiges ; et tout cela pour satisfaire le caprice d'un seul individu, qui en allant s'établir en cet endroit, a acquiescé tacitement à l'ordre de choses existant et accepté par la population.

E. Lafleur and *N. T. Rielle*, for the respondent:—

The general result of respondent's evidence is to show that the appellant is a rich and powerful man, and mayor of the village. He has great influence, and employs a large number of workmen, from among whom he has recruited the majority of his witnesses. He has abused his wealth and his position to carry on his business in a way that renders the neighbourhood unhealthy. He has turned the stream which is the main water supply of the village into a filthy sewer, thus depriving the respondent of his use of the water and menacing his health daily.

The plea that the respondent's *auteurs* consented to the appellant's use of the stream is simply an attempt to

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prove the establishment of a servitude without alleging or showing any title. It is an elementary proposition of our law that no servitude can be established without a title. (C. C. L. C. 549.)

The respondent submits that an examination of the pleadings and the evidence will show :—

1o. That the respondent has fairly proved the allegations of his declaration.

2o. The appellant's pleas are bad in law and irrelevant, with the possible exception of the one allegation : viz. that appellants' use of the stream is legal.

3o. That appellant has failed to make one word of evidence in support of this, his only legal plea.

This conclusion was summarized by the learned judge of the Court below, in delivering judgment : "*All the essen-* "*tial facts I find conclusively proved in favor of the plaintiff,* "*and uncontradicted by anything the defendant has been able to* "*adduce that has any strict relation to the case.*" "The water," continues the learned judge, "is rendered unwholesome " and pestiferous, if not absolutely and fatally poisonous, " and the cause of the mischief is undoubtedly the defen- " dant's tannery." These words are a fair statement of the result of an analysis of the evidence in this case. The only question, then, left for discussion is as to the legal effect and consequences of appellant's action.

The general rule of law as to personal responsibility, is laid down in arts. 1053 and 1054 of the Civil Code. The principle has been thus stated : "Tout individu est garant " de son fait, d'où il suit que si ce fait cause à autrui " quelque dommage, il faut que celui par la faute duquel " il est arrivé, soit tenu de le réparer. Ce principe n'ad- " met point d'exception." (Bertrand de Greneille). Articles 501 and 503 of the Civil Code state more particularly the reciprocal obligations of riparian proprietors on private streams.

The latter article (503) declares that : "He whose land " borders on a running stream, not forming part of the " public domain, may make use of it as it passes for the " utility of his land, *but in such manner as not to prevent the*

"*exercise of the same right by those to whom it belongs.*" The principle of non-aggravation of servitude, is as clearly established as any to be found in our law.

Demolombe, vol. 11, p. 43, 47; Lalaure, traité des servitudes, p. 654; Garnier, Régime des eaux, vol. 1, p. 202.

The appellant has tried to show that he conducts his tannery in the best possible way and with the greatest care. To prove that this is is not the case, the Court need only compare the description given of the working of appellant's tannery with the list of precautions required by the French law in such cases. Bunel, Etablissements Insalubres, p. 10. But even had the appellant taken the precautions whose very existence he seems to ignore, this would be no defence in an action for nuisance. *Coulson & Forbes*, Waters, p. 158. "Where the plaintiff has proved "a right to an injunction, it is no part of the duty of the "Court to inquire how the defendant can best remove "the nuisance."

The jurisprudence of this Court has been fixed on many of the points which arise in this action, in the case of *St-Charles & Doutre*, (18 L. C. J. 253). In that case, the same argument was made as to the care shown by the party carrying on an offensive trade, and Mr. Justice Ramsay there said: "If a person chooses to carry on an "offensive trade next door to my house, he must pay me "for it." Mr. Justice Sanborn said, "it must be remarked "that the authorities cited from some modern French "authors, to the effect that parties who are licensed to "carry on a particular trade which may incommode the "neighbourhood, are not liable for damages for exer-"cising their rights, do not exactly apply to this case. "There is no license here pretended." These remarks are exactly in point.

DORION, CH. J.:—

The appellant, by the judgment appealed from, has been condemned to pay to the respondent $500 damages for having polluted the water of a creek passing through the respondent's property, and for having deprived him

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of the use of it. The judgment also enjoins the appellant *to cease all manner of injury and annoyance to the plaintiff* (the present respondent) *in respect of the matters and things in and by the said action complained of, under all penalties of law.*

By his declaration, the respondent alleges that he is the owner of a property at Côte des Neiges, which he has occupied for the last five years as a residence during the summer months; that his lot is traversed by a private stream or water-course, which drains his property and the lots and farms above and below him; that for more than thirty years before his occupancy of said land, his *auteurs*, and other proprietors, had used the water-course for culinary and other domestic purposes, and for watering cattle and other animals on their properties; that the appellant is the owner of a large tannery and dyeing establishment at a distance of about three furlongs from the respondent's house, higher up the water-course, and that he has made an illegal use and abuse of said water-course, by fouling and polluting the same with various poisonous matters and substances used by him in his tannery; that the pollution of the water-course renders the water totally unfit for domestic purposes, and renders it dangerous to health from exhalations emanating from it, endangering thereby his health and that of his family.

By his conclusions the respondent asks that the appellant be condemned to pay him $2,000 damages, and be ordered to desist from fouling and polluting the stream, from damning up the same, and generally to carry on his tanning, dyeing and colouring establishment so as not to render the vicinity thereof, and the the respondent's property in particular, insalubrious and unpleasant, and in such manner as shall not interfere with the lawful use of the water-course.

The appellant has denied all the allegations of the respondent, and has further alleged by a special plea, that from time immemorial this creek had been used for tanning purposes by himself, his *auteurs* and others, with the assent of the *auteurs* of the respondent, and in

the interest of the population of the parish and of the public; that this creek which is used as a sewer for a large portion of the inhabitants of Côte des Neiges, and by the respondent himself, is more altered and corrupted by the use which they make of it than by himself and other tanners; that the respondent, when he went to settle there, must have known the use which was made of the creek, and had consented like the rest of the population to submit to the inconveniences arising from it, in the general interest, and that he, the appellant, had only used the water as the law and usage allowed him to do.

The evidence shows that from time immemorial the principal industry of the village of Côte des Neiges, in the parish of Montreal, was the tanning of leather, that there are now four tanneries in the village, besides that of the appellant, which has existed for a long time, was burnt down and rebuilt by the appellant in 1873, its value being from $16,000 to $17,000; and that sixteen years ago there were eight tanneries more than there are now in the village. (Joseph Lortie, app. app. p. 35, l. 37.)

In 1880, the respondent, who is a builder residing in the City of Montreal, purchased for $800, from the heirs Marshall, the house and lot which he now occupies as a summer residence from May to September or October. In a straight line, it is about fifteen acres from appellant's tannery, but by following the windings of the creek, it is about nineteen acres lower down.

It is proved that the five tanneries above respondent's property use the water of the creek for their tanneries, that the drains BB, CC and DD, on the plan, the two first discharging into the creek above the appellant's tannery and the latter below it, but above the respondent's house, are used as sewers for the greater portion of the village, and receive either directly through the natural declivity of the land, or through flues and other means, the sewage and refuse from houses, privies, stables, pig-sties, which are built on or near it, and also the drainage of the roads and streets for about thirty acres; that there are a num-

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ber of market-gardeners who collect large quantities of manure and materials for compost which are deposited near the creek, the washings of which, from the natural declivity of the land, are carried into the creek. Michel Hurtubise, Resp. App., p. 45, p. 49, p. 50, François Desmarchais, App. App., p. 11; Benj. Lortie, App. App., p. 43; Ch. Grenier, App. App., p. 104; Hugh Murphy, App. App., p. 30; Augustin Desmarchais, pp. 15, 16 and 17; Jos. Lortie, p. 34 and p. 40.

The drains of the Côte des Neiges cemetery, used as a burial ground for all the Roman Catholic population of the City of Montreal and surrounding villages, discharge into this creek a short distance above the appellant's tannery. (Pierre Robert, Resp. App., p. 85.)

The respondent having selected this locality for a summer residence, and having occupied his house for six summers before he brought his action, it was incumbent upon him to prove that the appellant had used the water of the creek so as to deprive the respondent of its use, or that he had polluted it to such an extent as to render it dangerous to health from the offensive smell emanating from it, and failing to prove either complaint he must succumb in his demand.

As regards the allegation that for upwards of thirty years before he, the respondent, acquired his property, his *auteurs* used the water of the creek, it is totally disproved.

François Desmarchais, who was brought up on the farm where the respondent's house has been erected, after stating that his father lived there for forty years, that he himself built the respondent's house, where he lived for sixteen years, after which he leased for two years to one Marshall, to whom he sold it in 1870, after Marshall had occupied it for two years as a tenant, and after explaining that the water was not clean, and giving the reason why, and being asked whether anybody ever thought of drinking this water, answers (App. App. p. 5): "On ne pouvait pas boire cette eau-là, parce que "personne connaissant comment était construit le village,

" n'aurait bu de cette eau-là ; il y en avait qui en buvaient, " mais tous les égouts étaient bâtis dessus. Les égouts du " chemin aussi, pour trente arpents, tombent dedans.

Q. " De sorte que, même s'il n'y avait pas de tanneries, " une personne connaissant le village ne songerait à boire " de l'eau coulant dans ce ruisseau-là ?

R. " Non, je sais bien que pour moi, je n'en boirais pas, " parce qu'il y a des égouts qui sont trop sales qui coulent " dedans.

A. " Alors, si je comprends bien, tout le monde à la " Côte des Neiges considère donc ce ruisseau comme une " espèce d'égout ?

R. " C'est un égout, l'égout de tout le village."

This witness is corroborated by most of the other witnesses, who say that the water of the creek cannot be used, and never has been used, for culinary or domestic purposes, not even for washing.

Although the evidence is somewhat conflicting, it seems that this water is still used by most of the inhabitants for watering cattle.

This evidence effectually disposes of the complaint made by the respondent that the use which appellant makes of the water at his tannery has deprived him of the use of it for culinary purposes.

There is, however, a still more peremptory answer to the respondent's complaint that he is deprived of the use of the water, both for domestic purposes and for watering cattle. The evidence shows that the creek is covered throughout the whole of its course across the property of the respondent. (Michel Hurtubise, Resp. App., p. 48, Augustin Desmarchais, App. App., p. 30. Dr. Edwards' report, where he says that the sample of water No. 4 was taken " from Weir's garden entering culvert.")

This covering of the creek, if done by the respondent, shows a deliberate intention on his part not to use the water for either domestic or other purposes, and shews plainly that he did not require it ; if done by his *auteurs*, it shows that they also did not consider it of any use or advantage to their property.

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In this connection it may also be observed that it appears that the respondent has no cattle to water, and that there is an abundance of water all through the locality. (Hugh Murphy, App. App. p. 30.) Michel Hurtubise, Resp. App. p. 49, says :—" Ils en ont (de l'eau) " tant qu'ils veulent. Ils ont de l'eau de source."

The respondent has no interest in complaining that he was deprived of the use of the stream which he does not require, and for which he has no use. It is a well-known rule of law, that in matters of property, the use of which is common to several parties, such as a stream, those who do not use it cannot prevent the others from enjoying all its advantages. It is in most cases the only basis of the preference given to prior occupation. Courts of justice will protect vested interests, but will not encourage malicious proceedings.

Pardessus des servitudes, vol. 1, p. 344, No. 142. Proudhon, Domaine public, vol. 4, No. 1240.

Yet the judgment of the Court below, condemning the appellant to pay $500, and to cease injuring the respondent, seems from the *considérants* or motives given, to be based exclusively on the abstract right of the respondent to use the water of this creek, which the evidence shows he does not require.

I now pass to the other and only other cause of complaint of the respondent, and where he charges the appellant with having polluted the water " to such an " extent, that *it is rendered dangerous to health from the* " *exhalations emanating from it, endangering thereby his health* " *and that of his family.*"

Upon this point a great many witnesses have been examined, most of whom say that the creek emits no smell to inconvenience the neighbours, that the water is not potable, but that this is due to the fact that it is used to receive the sewage of the whole village. Others say, that, occasionally, it emits some bad smell in the summer season, and this when the creek or the drains emptying into it are cleaned ; others, on the contrary, say that the exhalations of the creek are most offensive and

dangerous to health, and that this is due to the appellant's tannery and other tanneries on the creek.

These contradictory views, expressed by non-scientific men, and by persons who, in many cases, principally among the witnesses favourable to the respondent's complaints, have never visited the tannery of the appellant, are not aware of the tanning process used in said tannery, nor in the others above it, are mere individual opinions, and can be of very little assistance to enable the Court to come to an exact appreciation of the merits of the case, unless when based upon some well ascertained facts sufficient to give them substance.

The important facts which have been proved in this connection, are—1st, that the manures collected by market gardeners, and the drains discharging into the creek, are sufficient to render the water unfit for culinary or domestic purposes.

2nd—That while the number of tanneries in the village is on the decrease, and the population and market gardeners on the increase, the respondent's witnesses say that the smell for the last four or five years has been increasing.

To this must be added this important fact, that most of the witnesses on behalf of the appellant state in the most positive manner that the water of the creek, before entering the appellant's tannery, is more polluted than when it comes out of it, and they account for this by stating that the matters thrown out of the tannery into the creek are principally lime or water-lime, and exhausted liquor of tan bark, and that the lime has the effect of purifying the water instead of polluting it.

It is also proved that the water is worse at Dr. Desmarchais' orchard below the respondent's property, than immediately above it, although there are no tanneries between the two places, the creek only crossing Findlay's place, a market gardener, who, it is proved, keeps large heaps of fermenting manures on his place. (F. X. Boileau, App. App., pp. 127-128; Frs. Desmarchais, App. App., pp. 18 and 20; Dr. Prendergast, App. App., p. 102; Benj.

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Lortie, App. App., p. 48; M. Hurtubise, Resp. App., p. 44; Philias Archambault, App. App., 22).

These witnesses show that if the water is polluted it is not by the tanneries, but by the manure heaps collected by the gardeners on their premises, and by the sewage coming into the creek through the village drains.

There is also another significant fact to be noticed.

Augustin Desmarchais, app. app., p. 123, says:—"Je "sais que M. Weir, le demandeur en cette cause, a fait "un berceau au-dessus du ruisseau en question. J'ai "passé plusieurs fois à la porte là. M. Weir était dans "son berceau avec ses enfants; il lisait ses journaux."

This has not been contradicted, nor has it been explained how it is that the respondent should have selected this very spot to erect a *berceau*, bower or summer house, and that he should retire there with his children to read his newspapers, if the exhalations of the water of the creek are so offensive as he contends.

Three scientific witnesses have been examined; they are Dr. Baker Edwards, public analyst, on behalf of the respondent, and Dr. Fafard and Chs. Alfred Pfister, both professors of chemistry, on behalf of the appellant.

Dr. Edwards analysed ten samples of water taken in the creek. Two of them, No. 1 and No. 2, taken in the pond at the club house and the public pond in the upper part of the village, and before the creek had reached the outlet of the three drains BB, CC, DD, were found to be pure and potable. The pond at the club house and the public pond, two different places, are from three to five acres above the appellant's tannery. No. 3 was taken at Lacombe's, about two acres below appellant's tannery, and after the creek had received the sewage of almost the whole village, through drains BB, CC, DD, and also the sewage of Lajeunesse's hotel, it was found considerably less pure, and contained organic matter in excess. No. 4 was taken from Weir's garden, where the creek entered the culvert, that is, at the upper part of respondent's property, and No. 5 was taken from Findlay's yard, (Findlay is a gardener who collects large quantities of

manure; he is the respondent's neighbour lower down); both these samples he found still less pure and containing excess of organic carbon and nitrogen, and were not potable waters. No. 6, from Dr. Desmarchais', still lower down, was darker in colour, contained more organic carbon and nitrogen, and some tannic acid oxide of iron, and was not fit for drinking purposes.

Of the four other samples No. 7 was taken by Findlay in his garden, and No. 8 at Mr. Desmarchais', No. 7 being about the same as Nos. 4 and 5; and No. 8 highly impure and charged with organic and mineral matter rendering it unfit for any domestic purpose. All these were taken on the first and second of December, 1885. Nos. 9 and 10 were taken at Dr. Desmarchais', and handed by Findlay to Dr. Edwards who says they were taken on the first of September and handed to him by Findlay in December, 1885. Findlay says those two samples were taken by Pierre Desmarchais before September, that Desmarchais gave them to him, and that he handed them to Dr. Edwards on the first of September. This shows the irregularity with which these important operations were carried on. These samples, No. 9 and 10, were foul, unfit for the use of man and cattle, had become offensive in odour by keeping, and had a considerable deposit of foul organic matter.

It is worthy of remark that out of the ten samples analysed by Dr. Edwards, six were taken below the respondent's property, only two between the appellant's tannery and the respondent's property, and two were taken at such distance above the village, where it was well known the water was pure. This would almost indicate a determination on the part of the respondent to make out a case against the appellant. But it may well be asked, what effect can the quality of the six samples of water taken below the respondent's property have upon this case? That the water is worse at Dr. Desmarchais' than at the respondent's, seems to be proved by the operations of Dr. Edwards, yet there are no tanneries between the respondent's property and that of

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Dr. Desmarchais; the natural inference would be that the water is polluted by other causes than by the working of the tanneries; but whatever may be the cause, it was not sufficient for the respondent to show that the water was bad at Dr. Desmarchais', but that it is bad on the respondent's property and that this was due to the appellant's tannery. There was a very easy mode of verifying that; it was to analyse water taken where the creek enters on appellant's property, and also some taken at the point where it leaves the appellant's property, and this would have at once shown whether those witnesses, who say that the water is better immediately below the appellant's tannery than it is immediately above, are right, and whether the tannery is the cause of the pollution of the water. This has not been done, and it is in vain that the respondent claims that a mile above his property the water is good and that several acres below it is bad. This proves nothing. He has failed to show by the only test that would have been conclusive that the appellant's tannery polluted the water, for as one of the witnesses who speaks of the causes of the pollution of the water above the tannery justly remarks, that he receives the water when it is dirty, and cannot return it clean.

Dr. Edwards never visited the tannery; knows nothing of the village, not even that there are other tanneries than that of the appellant. He was directed by the respondent, who accompanied him, to take water at certain places, and he did so; but he did not take it at the right place, so as to make an intelligent report, and it will be noticed that none of the samples of water which were analyzed emitted any bad smell, except samples 9 and 10, which, he says, had been polluted by keeping and were taken at Dr. Desmarchais' place.

Dr. Fafard and Professor Pfister have both contradicted Dr. Edwards' testimony in some important particulars. They have proved that the drains of the village were much more obnoxious than the tanneries, and that the lime thrown out of the appellant's tannery would, to a

considerable extent, purify the pollution which ran through it from above.

Dr. Edwards found samples 9 and 10 strongly impregnated with salts of ammoniac, and this seems to be the most objectionable matter he found in them.

Now, there is nothing to show that salts of ammoniac are produced by the materials coming out of a tannery.

Salts of ammoniac are found in large quantities in urines, privies, cemeteries, in manures, and in all organic matters in decomposition, and lime and lime-water will expel the ammoniac from these substances. Bouillet, Dict. des Sciences, vo. Sel Amoniac and vo. Amoniaque.

This is a strong corroboration of Dr. Fafard's and of Prof. Pfister's testimony, and of all those witnesses who say that the lime would have a beneficial effect upon the polluted waters of the stream coming from above appellant's tannery.

In France, where the regulations of noxious industries and manufactories are based on more scientific principles than perhaps in any other country, the administrative authorities, under the sanction of the law, have divided those industries into three classes :—1st. Dangerous ; 2nd. Unhealthy ; and 3rd. Inconvenient. Macarel, Etablissements dangereux, notions préliminaires, p. xii., No. 8, says :—" Ainsi la denomination légale est désormais (since the ordinances of 9th of February, 1825, and 5th November, 1826) *ateliers dangéreux, insalubres, ou incommodes.*"

In the list prepared under the direction of the Minister of the Interior, beginning at page 263 of the same book, manures, and deposits of materials intended to be used as manures, are placed in the first class among those matters that are declared dangerous (p. 270), while tanneries are placed in the second as being merely unhealthy on account of bad smell (p. 280).

This classification has been made after most minute examination by scientific and practical men of the inconveniences or dangers of the classified industries. This is the strongest corroboration of the views of those who,

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like Dr. Fafard, Dr. Prendergast, Prof. Pfister and a host of other witnesses, have testified that the pollution of the water of the creek was not due to the tanneries, but to the sewage and accumulation of filth and manures along the drains which carry this sewage and filthy matter into the creek above, and it is proved that every precaution is taken to prevent any solid matter, and particularly skins, from falling into the creek. But suppose this piece of skin had come from appellant's tannery, it would be a mere accident, and no ground to close appellant's tannery. It is proved that none of the white lead or *blanc de ceruse*, used in the tannery, finds its way into the creek, nor that any quantity, or what quantity, of the other matters mentioned in the appellant's evidence, are thrown into the water at appellant's tannery.

The respondent, as I read the evidence, has entirely failed to prove that the tannery of the appellant pollutes the water of the creek so as to affect the respondent's property; he has not proved that his property has been depreciated in value, and his action should have been dismissed.

But let us suppose that if other causes did not exist to pollute the water, it should appear that the tannery of the appellant has the effect of disturbing the water and rendering it less clear and less potable than it otherwise would be, what under the circumstances of this case would be the rights of the parties? in other words, what would be the law applicable to such a case?

I have no hesitation to say, that all the English and American decisions which have been cited at the bar, have no authority whatever in a case like the present one, which is to be decided exclusively by the rules and principles of the French law in force in the Province of Quebec.

The respondent seems to consider that if the appellant throws anything in the water which contributes to impair its quality, he is responsible for the offensive matters which the other tanners or the other inhabitants of the village throw in it. Now, this is not correct. The solidarity

invoked does not exist, except when the nuisance arises out of an identical cause. The Cour de Cassation have applied the principle in the case of fumes coming out of several different establishments on the same lot of land; and the reason is evident, the fumes could not be divided, and the cause of the annoyance was the same.

But to pretend that solidarity exists between parties, some of whom discharge the sewage of their houses and properties, and others who merely send lime water through a creek, cannot be justified by any authority or precedent.

The respondent invokes the rule laid down in Art. 549 of the Civil Code, that no servitude can be established by prescription.

This has no more application to the case than the English and American authorities already mentioned.

The appellant does not claim a servitude upon the respondent's property; but he claims—1st, that he has the right to use his own property and the water passing through it, provided he does not cause more inconvenience to his neighbours than the laws and obligations of good neighbourhood will allow him to do. (Aubry & Rau, vol. 2, p. 194, 7 al., Rolland de Villargues vo. Voisinage, No. 5).

2ndly. He contends that he has a right to use the water passing in the creek in any way he pleases, provided he returns it to the creek in the same condition that he received it.

And 3rdly, that he has only used the water of the creek according to a usage existing in the locality from time immemorial, to the knowledge of the respondent, of his *auteurs*, of all the inhabitants of the village, not only without complaint on their part, but with their tacit assent, and that the respondent, who has only acquired his property since the appellant has been using this creek for the purposes of his tannery, cannot now deprive him of such use.

Laurent, Vol. 6, p. 195, No. 144, describes with his usual vigour the rights and obligations of neighbours

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towards each other. After having laid down, in the preceding number, the broad principle that whenever a proprietor, in using his rights, causes some injury to his neighbour, he must repair it, he says, *loc. cit.*, No. 144: "Il y a lieu à "réparation lorsqu'il y a un droit lésé. D'après la rigueur "des principes, il faudrait décider que le droit de pro- "priété est lésé dès qu'il est altéré, c'est-à-dire diminué, "soit que le propriétaire souffre dans sa santé ou dans sa "commodité, soit que ses meubles ou ses immeubles soient "dégradés, en un mot, quand on porte atteinte au pouvoir "qu'il a sur sa chose. Mais ce principe absolu est d'une "application impossible partout où la population est plus "ou moins agglomérée. Les maisons des habitants se "touchent, il est impossible qui cette cohabitation laisse "subsister le droit de propriété dans ce qu'il a d'illégitime "et d'exclusif. D'après la rigueur du droit, chaque pro- "priétaire pourrait s'opposer à ce que ses voisins envoient "dans son fonds une fumée ou des exhalaisons quelconques, "car il a droit à la purete de l'air pour sa personne et pour "ses biens; or, la fumée l'altère nécessairement dans une "certaine mesure. Que résulterait-t-il de ce pouvoir abso- "lu? C'est que l'existence des villes deviendrait impos- "sible en effet, dans toute maison on fait du feu, il n'y a "pas de feu sans fumée, et la fumée altère la pureté de "l'air. Tout voisin pourrait donc agir contre son voisin, "et pourrait être actionné à son tour; la vie se passerait "en procès, à moins que les hommes ne se décidassent à "retourner dans les bois. Ce n'est pas tout. Il n'y a pas de "société civilisée sans industrie, or, l'industrie ne marche "guère sans la vapeur. De là cette noire et épaisse fumée "qui sort des grandes cheminées de nos établissements "industrielles; de là une nouvelle cause d'insalubrité et "d'incommodité pour les voisins, et partant une nouvelle "atteinte au droit de propriété. Il n'y aurait qu'un moyen "de prévenir ces lésions incessantes, ce serait de reléguer "toutes les industries hors des villes. Mais cela ne se peut. "Il y a de petites industries qui, tout en étant incommodes "pour leur premiers voisins, sont nécessaires aux habi- "tants; que diraient s'ils ne trouvaient dans leur voisinage

" un serrurier ou un poëlier? Il est donc nécessaire de con-
" server les industries dans les villes. En definitive, la
" co-existence des hommes amène des inconvénients
" qui sont inévitables, que par conséquent chacun doit
" supporter: c'est ce que la doctrine et la jurisprudence
" appellent les obligations naissant du voisinage. Il a été
" jugé par application de ce principe, que les voisins ne
" peuvent pas demander la suppression d'un four d'où
" s'exhale une fumée épaisse qui les incommode, parce
" que c'est là une charge du voisinage." (Bordeaux 9 mai 1823 et arrêt de rejet 30 décembre 1824. Dalloz au mot servitude, No. 702.)

No. 143: " Est-ce à dire que les habitants doivent tous
" souffrir par une nécessité de la vie commune? Non,
" certes. Il y a conflit entre l'industrie et la propriété; il
" ne faut pas que le droit de propriété rende l'industrie
" impossible, les propriétaires seraient les premiers à en
" souffrir. Mais aussi il ne faut pas que l'industrie rende
" les villes inhabitables, etc.

" Cela est très vague, mais il est impossible de préciser
" davantage, car la question est de fait plustôt que de
" droit." (Arrêt de rejet du 28 fév. 1848; Dalloz, 1848, 1-122).

" En voici la preuve. Que l'on compare les arrêts rendus
" dans une ville industrielle telle que Gand, avec les arrêts
" rendus dans une ville de loisir et de luxe, telle que Brux-
" elles, on verra que les décisions diffèrent considérable-
" ment. La Cour de Gand montre une grande sollicitude
" pour l'industrie, et à juste titre, puisque sans son indus-
" trie la ville de Gand ne serait plus qu'un village; tandis
" que la Cour de Bruxelles se préoccupe davantage des
" commodités et des aises de la propriété. Voila de nou-
" velles nécessités dont les Magistrats doivent tenir compte
" dans les conflits journaliers qui s'élèvent entre la pro-
" priété et l'industrie."

This common-sense view of the question is borne out by the several decisions referred to by Laurent, and is quite applicable to the circumstances of the present case.

Demolombe, vol. 12, p. 150, No. 658, says:—" Et main-

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" tenant, en fait, dans quel cas y aura-t-il lieu d'accorder " des dommages intérêts ? "

" C'est là principalement une question d'espèce, sur " laquelle il appartient au Magistrat de prononcer suivant " les différentes circonstances de la cause..... ..... " .....Il faut distinguer, en effet, entre les in- " convénients ordinaires et, pour ainsi dire, inévitables du " voisinage, et auxquelles l'on doit s'attendre et se résigner " dans les associations au sein desquelles nous vivons et " les circonstances extraordinaires et imprévues."

Domat, cited by Demolombe, says :—" Les différentes " incommodités q'un voisin peut causer à l'autre doivent " se souffrir, si la servitude en est établie ; et *s'il n'y a* " *point de servitude*, l'incommodité sera soufferte ou empê- " chée, *selon la qualité des lieux et celle de l'incommodité*, et " selon que les règles de la police *ou de l'usage*, s'il y en a, " y auront pourvu."

This authority is very important. Domat gives the rule under the old law, and shows that, as between neighbours, there are other obligations than those created by servitudes, and that, therefore, Art. 549 is not applicable here. He also shows that these obligations must be determined according to the *quality* of the *locality*, the *extent of the inconvenience*, and also according to *existing usages*.

Upon this, Demolombe, p. 157, says :—" C'est qu'on ne " saurait effectivement, en pareille matière, poser de " règle absolue. Il est évident que le bien de la société, " ainsi que l'intérêt réciproque des propriétaires eux- " mêmes, et la liberté des professions et de l'industrie " exigent que l'on tolère, à coté de soi, bien des choses " déplaisantes et désagréables."

Idem, p. 153, No. 659. " C'est à l'expérience des magis- " trats, à leur sagesse, à leur équité, qu'il appartient de " faire convenablement et humainement, ces difficiles et " délicates applications de notre règle."

" Ils prendront en considération *la qualité des lieux*, " comme dit Domat (supra No. 658), suivant qu'il s'agira " de décider la question soit dans les villes, où les habita-

"tions sont nécessairement agglomérées, soit dans les "campagnes où elles se touchent beaucoup moins;—*dans "certaines villes presqu'exclusivement consacrées à l'exploitation "de différentes sortes d'industries plus ou moins bruyantes et "incommodes, ou dans les villes peu commerçantes et plus "calmes; et quelques fois dans la même ville, on pourra tenir "compte des différents quartiers, des usages anciens, qui y ont "toujours été observés pour décider* suivant les cas, si le pro- "priétaire qui se plaint a pu et dû plus ou moins raison- "nablement s'attendre à l'incommodité contre laquelle il "réclame"—(comp. jugement du tribunal civil de St- "Etienne, du 5 fév. 1844, Rivoire, Dev. 1848. 1. 312.)

"Il est surtout deux considérations qui nous paraissent "devoir exercer une grande influence sur ces sortes "d'affaires:.....

"C'est, d'une part, la bonne foi ou la mauvaise foi..... "p. 155. C'est d'autre part, la *préoccupation*, c'est-à-dire "l'antériorité de possession et d'existence: *volenti non fit in- "juria*, et, par exemple, on pourrait dire, en général, que le "propriétaire qui ferait des constructions dans le voisinage "d'un établissement industriel, antérieurement créé, se "serait lui-même, *et de son plein gré, soumis à en supporter les "incommodités*. Nos anciennes coutumes et nos vieux au- "teurs attachaient aussi beaucoup d'importance, dans les "relations du voisinage, à cette idée de la préoccupation. "(Comp. Orléans, art. 246; Nivernois, art. 13, des mai- "sons et servitudes; Normandie, arts. 613, 614; Pothier "de la Société No. 211; Guy-Coquille sur l'art. 13 précité).

Idem No. 659 bis.—Aubry & Rau, t. 2, p. 196, 2e al. et note 9. Macarel, Des ateliers dangereux, etc., pp. 15, 16 et 17. Avisse, des établissements dangereux, p. 334-350. Dalloz 1826, 1, 424. Pardessus des servitudes, t. 1. p. 220 et 221, No. 91. This last writer shows to what extent neighbours are obliged to bear with drains and polluted water.

Guyot, Rep. Vo. Voisinage, p. 527, 2nd col. 1 al. "Lorsqu'il n'y a point de quartier affecté à telle ou telle "profession en particulier et que ceux qui l'exercent ne "font rien de contraire aux règlements de police, *on reçoit*

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" *difficilement les demandes des voisins pour empêcher les artisans* " *de tirer tout le parti qu'ils peuvent de leur maison, surtout si* " *elles servent depuis longtemps à cet usage.*".....

" S'il en était autrement, les professions les plus néces- " saires seraient bannies des villes, et celles de commerce " en particulier, ne pourraient subsister. *Les tanneries, les* " *teintures*, une quantité d'autres manufactures, répandent " au loin de fort mauvaises odeurs."

The remarks of the writer and the two arrêts which he cites in support of his views are important in showing, 1st, to what extent the use made of a property, called *usage*, will restrain neighbours from their complaint against obnoxious industries carried on by their co-neighbours. 2nd. What precautions are taken to investigate the character of the establishment or nuisance complained of before ordering the suppression of an obnoxious establishment.

In one of the cases cited it was ordered that the judge should himself visit the establishment complained of. In the other case the police officers of Melun were ordered to report on the case, and they caused the establishment to be examined by an *expert juré*, that is, a professional expert (*expert juré* is more than a sworn expert, it is an officer or *expert en titre*) before making their report.

I do not believe that in the whole course of judicial proceedings in France from the remotest day to the present time a single industrial establishment, not absolutely prohibited by police regulations, has ever been suppressed without a *descente sur les lieux*, that is a survey by the Judge himself or a report of practical experts having first been made. In the present case, without any report of experts or any previous examination whatever of the premises of the appellant, or of his mode of carrying on his business, and upon the most conflicting evidence of uneducated and untrained witnesses, which evidence, however unsatisfactory it may be, is vastly preponderating in favor of the pretentions of the appellant, the Court below has practically ordered the suppression of

the appellant's establishment, the effect of which will be to close all other similar establishments at Côte des Neiges, for, as the witnesses say, without the use of the creek the tanning business cannot be carried on, and if the tanning business is driven away, the village also must go. It cannot be supposed that so many tanning establishments have been gathered at Côte des Neiges, unless some special advantages were offered by the locality, and these advantages are to be found in the facilities offered by the constant flow of water and the swift current of the stream for washing the skins and carrying away the lime water and exhausted liquor of bark used in these establishments.—Macarel, pp. 141 and 142. Considérant, etc.

All these natural advantages would be lost to industry if the judgment of the Court below was maintained. The respondent, who has obtained $500 damages for the inconvenience of which he complains in the enjoyment of a property worth $800, encouraged by his success would no doubt direct his efforts against the market gardeners who, from the evidence, are more objectionable than the tanners, and would drive them away. Then would come the turn of the cemetery, which would have to be removed also, since from its situation it is or must in the course of time be the most notable obstacle to the purity of the water of the creek into which its drains discharge.

This would be the natural but extravagant result of the absolute and extreme right of property recognized by the judgment of the Court below.

One more observation is required. It is as to the vagueness of the judgment. The Court did not indicate what the appellant should do to abate the nuisance complained of, and this was found by the Court of Cassation a sufficient ground to reverse the judgment rendered in case of Drosne v. Puzin, reported in Sirey, 1865, I, 811 to 817. See last considérant p. 817. The respondent, if really the drains are so bad as represented, should have notified the inspectors of roads and ditches, and they

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would probably have found a way of diminishing if not entirely removing the nuisance complained of.

It seems to me that in suing the appellant he has mistaken his remedy.

In the case of *McGibbon & Bedard*, which was far less favorable in every respect than is the case of the appellant, the Court below ordered McGibbon to abate the nuisance caused by his tannery. This judgment was reversed by the Court of Revision, whose judgment was confirmed unanimously by this court.

Following the judgment of *McGibbon & Bedard*, this Court has come to the conclusion that the judgment of the Court below must be reversed and the action dismissed.

CROSS, J.:—

I concur in the opinion of the Honorable the Chief Justice, but would by way of qualification remark, I consider that while the water course in question is proved to have been to some extent used as a sewer and impurities emptied into it from other sources, a very considerable portion of them came from the appellant's tannery; that the modern process of tanning used by him requires the application of powerful chemicals, the refuse of which with some scraps of skin and animal remains were emptied into the stream from his tannery and added materially to the pollution of the water, although it was quite possible to dispose of them otherwise, as, for instance, by removing them into the earth. Had the issue been merely as to an exaggeration by this means of the servitude upon the lower proprietors and had the respondent's conclusions been specially applicable, I would have been disposed to make an order forbidding the appellant to empty such chemicals and animal remains into the stream.

The judgment in appeal is as follows:—

"La Cour, etc.....

"Considérant que l'intimé, demandeur en Cour de première instance, se plaint que l'appelant, défendeur en Cour de première instance, corrompt et détériore l'eau

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d'un certain ruisseau qui coule dans le village de la Côte-des-Neiges, paroisse de Notre-Dame de toutes Grâces, et traverse les propriétés des parties, et demande par ses conclusions une condamnation pour dommages, et qu'il soit enjoint au dit appelant de cesser de corrompre l'eau du dit ruisseau, d'y faire un barrage et généralement d'exercer son métier de tanneur dans sa tannerie, afin de ne pas rendre les propriétés dans le voisinage, et plus particulièrement celle de l'intimé, insalubre et désagréable ;

"Considérant que l'appelant, outre une dénégation générale des faits allégués par l'intimé, a plaidé que lui et ses prédécesseurs s'étaient servi, de temps immémorial, de ce ruisseau pour tanner les cuirs, et ce, du consentement des habitants du dit village et des auteurs et prédécesseurs de l'intimé ; que ce dernier n'était venu s'y établir que depuis peu de temps et qu'il connaissait, lorsqu'il a acheté la propriété qu'il occupe, les inconvénients qui devaient résulter des tanneries qui existaient dans la localité ;

"Considérant que l'intimé n'a pas prouvé les allégués essentiels de sa déclaration et que l'appelant a prouvé ceux de ses exceptions et défenses, et, notamment, que depuis un temps immémorial, le ruisseau dont il est question, qui est, en vertu d'un procès-verbal, sous le contrôle et la direction de la municipalité de la Côte-des-Neiges, a servi d'égout tant pour les propriétés riveraines que pour l'usage des tanneries exerçant leur industrie dans le village ; que la principale industrie des habitants de la Côte-des-Neiges où est située la tannerie de l'appelant, a été de tout temps le tannage des cuirs et que ceux qui ont exploité les différentes tanneries qui s'y trouvaient, ont toujours fait usage du ruisseau, qui traverse les héritages des parties, pour leurs tanneries, comme l'a fait l'appelant ; que la propriété de l'intimé est située à une vingtaine d'arpents au-dessous de celle de l'appelant et qu'elles sont séparées l'une de l'autre par un nombre de propriétés intermédiaires ; que les voisins immédiats de la propriété de l'appelant ne se plaignent pas de l'usage que ce dernier fait du dit ruisseau pour les fins de son industrie ; et que,

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de fait, il n'en résulte d'autres inconvénients, pour les habitants de la localité, que ceux qui sont inséparables de l'exploitation d'industries nécessaires, et auxquels l'intimé devait s'attendre lorsqu'il a acheté sa propriété dans une localité où il a toujours existé plusieurs tanneries outre celle de l'appelant, et auxquels se sont toujours soumis les habitants de la localité ; que l'exploitation de tanneries dans le village de la Côte-des-Neiges est la principale industrie de la localité et que prohiber, à la requête de l'intimé, l'usage que de tout temps les tanneurs ont fait de ce ruisseau, aurait pour effet de détruire cette industrie qui ajoute à la prospérité des habitants de ce village et rehausse la valeur de leurs propriétés ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance, siégeant à Montréal le 30 octobre 1886 ;

" Cette Cour casse et annule le dit jugement du 30 octobre 1886, et, procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, renvoie l'action de l'intimé et le condamne à payer à l'appelant les dépens encourus tant en Cour de première instance que sur l'appel, ces frais à être taxés comme sur un appel de première classe et à être distraits, etc."

Judgment reversed.

David, Demers & Gervais, attorneys for appellant.
Lafleur & Rielle, attorneys for respondent.
(J. K.)

March 26, 1887.

Coram DORION, Ch. J., TESSIER, BABY, CHURCH, JJ.

THE MAIL PRINTING AND PUBLISHING CO.,
(*Defendants in Court below*),
APPELLANTS;

AND

THE CANADA SHIPPING CO.,
(*Plaintiffs in Court below*),
RESPONDENTS.

Jury trial—Time for fixing facts for jury—Art. 352, *C. C. P.—Acquiescence—Libel—Error in name of defendant—Amendment by final judgment.*

HELD:—(affirming the judgment of the Court of Review, M.L.R., 3 S. C. 23) 1. The rule contained in Art. 352, C. C. P., which says that no trial is fixed until the facts to be inquired into by the jury have been assigned, is one to be strictly followed; and where a motion by plaintiff to reform the assignment of facts was granted after the day for the trial was fixed, this was an irregularity which the defendants were entitled to urge, unless it appeared that they had suffered no injustice by the error. But in the present case, the defendants had waived their right to object by acquiescing in proceeding to trial, and by consenting that a bystander should serve on the jury when it appeared that sufficient jurors were not present to form a jury.

2. Where the publisher of a libel was summoned by a wrong name, and he appeared in that name, and, without disclosing his correct name, pleaded not guilty, such plea put in issue only the fact of publication and the innuendoes, and the verdict rendered against him by the jury could not be set aside on the ground that it was founded upon evidence of what was done by another person.

3. The judges of the Superior Court sitting in Review, were right in granting, at the final judgment, the plaintiff's motion to insert the correct name.

4. It was not misdirection for the judge to charge the jury, that by law they should find the article to have been published falsely and maliciously, inasmuch as the defendants did not plead and prove the truth of it.

The appeal was from a judgment of the Court of Review,

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April 30, 1885, refusing a new trial. The case in the Court below is fully reported in M. L. R., 3 S. C. 23-31.

The following are portions of the charge of JOHNSON, J., reduced to writing (under Art. 405, C. P. C.) :—

"The objections are numbered from 1 to 6 inclusive.

"As respects Nos. 1, 2, 3, 5 and 6, they relate to matters of fact. A judge's charge can only be objected to on matters of law ; with regard to facts, the judge stated to the jury that whatever his view of them might be, the jury was vested by law with the duty of deciding them according to their own convictions, irrespective of the appreciation of them by the Court.

"With respect to objection No. 4, the judge charged the jury to the effect that the newspaper article complained of brought the most venomous accusations against the plaintiffs' management of their line of ships. That those accusations were published to the world as true, and under the publisher's responsibility for their truth. That the only safe rule in such cases is that an accuser must prove the truth of his charges. That it is not for a plaintiff in such a case, to prove in the first instance, that the charges are false, though he may have that right afterwards, if the defendant attempts to prove the truth of them ; and without such proof by the defendant the charges could not be assumed to be true merely because they are made and published, but on the contrary, should be taken as false, and the plaintiffs to be not guilty of them, until they are proved."

The judgment in Review was in the following terms :—

"The Court having heard the parties by their respective, counsel, 1st, on the defendants' motion, filed on the 21st November last (1884), for an arrest of judgment in this cause and that the verdict rendered herein by a special jury on the 28th of October last (1884), be annulled and set aside ; 2nd, on the said defendants' motion, filed on the said 21st day of November last, for a new trial ; 3rd, on the plaintiffs' motion to amend, filed and received on the said 28th day of October last, and received by the Court ; and 4th, on plaintiffs' motion, filed on the 22nd

November last, that judgment be now pronounced in their favor against the defendants for the sum of $100 and interest from service of summons herein, and costs of suit, as taken in conformity with the said verdict of the jury, etc.;

"Doth dismiss said defendants' two motions, with costs;

"Doth grant said plaintiffs' motion to amend, and doth allow the said plaintiffs, without further notice, to amend their writ and declaration and all proceedings herein by striking out the words, "and publishing" from the name and description of said defendants wherever the same occur, to the end that the same accord with the evidence herein;

"And doth grant the said plaintiffs' motion for judgment on verdict, and doth adjudge and condemn the defendants to pay and satisfy to the plaintiffs the said sum of $100 currency with interest thereon from the 14th July, 1882, day of service of process in this cause, and costs, *distraits*, etc."

Hutchinson, for the appellants:—

The respondents on the 5th of July, 1882, instituted at Montreal an action against the appellants for the recovery of $25,000 as damages alleged to have been suffered by reason of the publication by the appellants of a certain article which appeared in the Toronto *Daily Mail*, of the 29th of June, 1882. The article has reference to the treatment of immigrants who came to Canada from England and Ireland by the respondents' steamer "Lake Nepigon" in May, 1882.

To this action the appellants pleaded a general denial, and it was specially denied that appellants were guilty in manner and form as set forth in respondents' declaration. The appellants also in their plea made option for a jury trial.

On the 15th of February, 1884, the appellants moved to have the cause tried by a special jury; that the facts to be enquired into by the jury be fixed; that a day be fixed for striking the panel, and another day for the trial. The respondents also at this date filed a statement of facts

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which they considered ought to be submitted to the jury. On the 12th of March, 1884, the Superior Court by judgment rendered on that day, granted appellants' motion for the jury trial, assigned the facts to be enquired into by the jury, and fixed the 18th of March for striking the panel, and the 1st of April, 1884, for the trial. On the 18th of March, 1884, both parties appeared before the prothonotary and struck the panel according to law. No trial, however, took place on the day fixed by this judgment, owing to both parties having agreed to wait to see the issue of another cause wherein damages were sought by the said respondents, by reason of the publication of the same article in another newspaper.

On the 3rd of September, 1884, the appellants again moved to have a day fixed for the trial, and also for striking the panel, and by judgment rendered by the Superior Court on the 4th of October, 1884, the 15th of October, 1884, was fixed for striking the panel, and the 28th of October, for the trial.

On the day fixed, 15th October, both parties appeared before the prothonotary and again struck the panel of jurors to be summoned to try the issues, but afterwards on the same day, 15th October, the respondents presented a motion to the Superior Court, praying that an entirely new and different statement of facts from that fixed by the Court by its judgment of the 12th March, 1884, be assigned as the facts to be enquired into by the jury,—and on the 21st of October, 1884, judgment was rendered by the Superior Court—six days after the panel had been struck, and seven days before the day named for the trial—fixing facts entirely different from those settled by the judgment of the 12th March, 1884. In the meantime the appellants, who were the parties who had demanded the jury trial, and who alone were anxious for this mode of trial, were obliged to issue a *venire facias* and summon the jury, and the jurors had been actually summoned when the judgment of the 21st October, fixing the facts *de novo* was rendered. The appellants thereupon made and filed a special exception to the said judgment,

and served a copy of it on the respondents with a notice to the effect that appellants would proceed to the trial under special reserve of their rights, and that they did not in any way acknowledge, but on the contrary, specially objected to the statement of facts fixed by the judgment of the 21st October, 1884. The trial took place on the day appointed—28th October, 1884; and a verdict was rendered against the appellants for $100.

Thereupon in due course the appellants moved before the Court of Review that the verdict be set aside and that a new trial be granted; and another motion was also made, asking for an arrest of judgment; the respondents at the same time moved for judgment upon the verdict.

The judgment rendered by the Court of Review, dismissed the appellants' two motions, and granted the motion of respondents, as well as another motion of respondents asking to be allowed to amend their writ and declaration.

The grounds of appellants' motion for a new trial are:—

1. Because the assignment of facts submitted to the jury does not comprise all the facts necessary to be proved, and because said facts were fixed by judgment of the Superior Court of the 12th March, 1884, and were not used or submitted to the jury, although respondents acquiesced in said facts, and afterwards took part in striking the panel, and no appeal from said judgment fixing said facts was taken by respondents, but on the 15th of October, 1884, a motion was made by respondents to change said facts, which was granted on the 21st October, 1884, after the jury had been duly summoned.

2. Because the verdict was unsupported by proof, and is contrary to the facts adduced.

3. Because there is manifest injustice in the verdict.

4. Because there is no evidence of record that appellants printed, published, or circulated the article complained of by respondents.

5. Because there is evidence of record that the said article was printed, published and circulated by a totally

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different corporation wholly unconnected with the appellants.

6. Because the honorable Judge who presided at the trial rejected the motion of appellants that it should be declared that there was no evidence to go to the jury as to the printing, publishing and circulating of said article by appellants.

7. Because the said Judge instructed the said jury to answer "Yes" to the second question submitted to them, although there was no proof in support of such answer.

8. Because the said Judge stated the following to the jury: "The case might be stated thus: A sues B for libel; B says, I once went by that name, but that is not my name now. The defendants (appellants) published this article, although under a different name;" whereas the fact was and is, and is of record, that defendants (appellants) did not print, publish or circulate the article in question, but that a totally different corporation printed, published and circulated said article, which corporation is, and always was wholly unconnected with and independent of the defendants (appellants), and appellants never had but one corporate name.

9. Because the said Judge charged the jury that they must say that the statements in the publication in question are false unless there is evidence that they are true.

10. Because said verdict is defective, illegal and contrary to law and evidence.

The grounds in support of the motion in arrest of judgment are: that it appears on the face of the record that notwithstanding said verdict, the respondents have no right to recover any sum; that there is no proof of record that appellants either printed, published or circulated the article complained of, and that there is proof of record that the said article was printed, published and circulated by a wholly different corporation in no way connected with appellants, and that it is evident a judgment upon said verdict would be reversed in appeal.

As to the first ground given for a new trial—the change of the facts to be enquired into by the jury—the two

judgments are of record, the one of the 12th of March, 1884, fixing the facts according to Article 352 of the Code of Civil Procedure; and the other of the 21st of October, 1884, assigning new and different facts to be enquired into by the jury. No appeal was taken from the first judgment and no objection made as to the sufficiency of the facts fixed by the first judgment, but on the contrary, the respondents fully acquiesced as above mentioned in this judgment, and it was only on the 15th of October—seven months after the facts had been fixed and no objection taken to them—and after the panel had been struck a second time, that a motion was made to have other facts assigned for the jury. By Article 352, C. C. P., no trial by jury can be fixed until the facts are assigned. The judgment fixing the day of trial for the second time had been rendered on the 4th of October, while the judgment assigning new facts was not rendered till the 21st of October. This latter judgment does not attempt to alter the day fixed for trial, although the assigning of the facts is a matter precedent to fixing the trial.

The second ground, that the verdict is unsupported by proof and is contrary to the evidence adduced, requires an examination of the evidence. The burden of proof that the appellants printed, published and circulated the article complained of, rests entirely upon the respondents. The appellants' contention is that there is no evidence against the appellants, but that there is evidence of an entirely different corporate body having printed, published and circulated the article in question.

In the first place it must be stated that there are two different corporate bodies each incorporated by an Act of the Federal Parliament, the one "The Mail Printing and Publishing Company" incorporated in 1872 by 35 Vic., chap. 111, which Act was amended in 1876 by 39 Vic. chap. 73; and the other "The Mail Printing Company" incorporated in 1880 by 43 Vic., chap. 73. The company sued is the Mail Printing and Publishing Company. These two are totally different, and independent one of the other. No stockholder in the one is or ever was a

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stockholder in the other. The newspaper containing the article complained of also contains a notice that the paper in question is printed and published by the Mail Printing Company, and no mention is made of the Company sued. And further it will be seen from section two of the Act 43 Vic. chap. 73, incorporating the Mail Printing Company, that this company did not even succeed to or acquire any property or rights from The Mail Printing and Publishing Company, but was specially constituted for the purpose of acquiring by purchase or otherwise, from three private individuals, the printing establishment and business carried on by them.

The respondents closed their proof, whereupon appellants moved that it be declared that there was no evidence to go to the jury as to the printing and publishing of the article complained of. This motion was over-ruled.

The respondents, however, recognized that there was really no case against the appellants, and thereupon moved "that they be allowed in Court here without "further notice to amend their writ and declaration and "all proceedings herein by striking out the words 'and "publishing' from the name and description of said de- "fendants wherever the same occur.' This motion was received by the Court, and judgment was reserved, but the motion was finally granted by the Court of Review.

The appellants contend that the granting of respondents' motion to amend their writ and declaration at the last moment, without notice, without costs, and without leave to appellants to plead *de novo*, is both illegal and unjust. It is evident that the respondents sued and impleaded the wrong company; and they cannot rectify this mistake by a simple motion to amend both writ and declaration at the last moment. The pretension of the respondents is that such a motion can be made under Art. 320, C.C.P. But this Article only provides that "the "Court may allow any pleading to be amended so as to "agree with the facts proved"; and "if in the opinion "of the Court the opposite party has not been led into

" error as to the real nature of the facts intended to be " alleged and proved."

C. P. Davidson, Q. C., for the respondents :—

Some pretence was urged by the defence at the trial. that the respondents had been misnamed in the proceedings, and that their true title was "The *Mail* Printing Company."

By the affidavit upon the back of the writ (No. 1), it appears that service was made upon the defendants " by " delivering to C. W. Bunting, the managing director of " the said company, true and certified copies of the said " writ and declaration at the office in the city of Toronto " aforesaid."

It having become necessary to examine a witness before the return of the writ, whose evidence might be required in rebuttal, a petition to that effect was served upon defendants by leaving a copy of the same with " one Douglass, the assistant manager of The *Mail* Printing Company." No objection was made, and the witness was by the Court duly ordered " to be examined on the 9th at 11 a. m."

The evidence as to publication by appellants was complete. It was made clear that the company upon which the writ was served, was the company which published the paper, and the jury found the defendants to be the publishers.

Appellants' motion for a new trial further complained that there were irregularities and omissions in connection with the fixing of facts. As appears by the transcript of proceedings, Torrance, J., on the 20th October, 1884, ordered a *venire*, fixed days for striking and new trial, and further adjudged " that the following questions of fact " shall be those which *the said jurors* shall inquire into " and answer."

Appellants took no action upon this order.

On the 3rd September, 1884, appellants moved that a day be fixed and a jury summoned ; respondents thereupon moved that it should be determined what facts were to be submitted, and those actually put before the

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jury were duly settled. They were practically identical with the ones prepared by Torrance, J., fairly cover the issues, and would be, beyond question, the very same as those which any jury ever called together in this case would have to consider.

DORION, Ch. J. :—

The first point raised by the appellants is, that they were sued under a wrong name: they are described as "The *Mail* Printing and Publishing Company," whereas their name is "The *Mail* Printing Company." At the trial, it was proved that long before the latter company was incorporated, a company existed called "The *Mail* Printing and Publishing Company." A motion was made to amend the writ in accordance with this fact, and the Court of Review adjudicated upon the motion at the final judgment, and allowed the amendment.

We hold that the appellants cannot avail themselves of this objection. It is proved that the officer of the company received a copy of the summons. No exception was pleaded, and it is only under their plea to the merits that the defendants seek to take advantage of the error. They do not show that they were prejudiced by it, and under the circumstances we are of opinion that it was the duty of the Court to grant the motion to amend. This is one of the things which may be amended at any stage of the case, and if the Court of Review had not granted the motion this Court would have granted it.

Another objection is this. According to the Code, the statement of facts for the jury should be settled before the jury are summoned. In this case there was a statement of facts settled before any jury was summoned. Then the trial was postponed. The appellants afterwards moved to have another day fixed, and the respondents presented another statement of facts. A new assignment of facts was made by the judge after the jury had been summoned. The appellants contend that this was irregular; that the facts could not be fixed after the jury was summoned, and that Art. 352 says so expressly. But the

appellants did not move to postpone the trial on that ground. On the contrary, they proceeded with the trial, and the verdict being against them for a small amount, they moved that it be set aside on the ground that the facts were not settled before the jury was summoned.

As there is no nullity mentioned in the article, I would be slow to set aside a verdict on that ground. The appellants do not show any prejudice or injury. It is the duty of a party when he is called upon to proceed to trial, to move at once, and not to wait and take his chance of a favourable verdict; and then, when the verdict is against him, come before the Court with an objection which he should have raised before. If he had made his motion in time, and it had been overruled, he would be in a better position to move for a new trial.

These are the principal points urged by the appellants, and on both grounds we are of opinion that the judgment should be confirmed.

Judgment confirmed.

Macmaster, Hutchinson & Weir, attorneys for the appellants.

Davidson & Bedard, attorneys for the respondents.

(J.K.)

June 30, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

EDWARD A. WHITEHEAD,
(*Plaintiff in Court below*),
APPELLANT;

AND

FELIX KIEFFER ET AL.,
(*Defendants in Court below*),

AND

ROBERT WHITE,
(*Intervenant in Court below*),
RESPONDENTS.

Sale—Simulation—Evidence—Purchaser in good faith.

The appellant (plaintiff) sought to recover machinery transferred to one Joseph Kieffer by deed of sale before notary, on the ground that the deed was simulated, and that the appellant was the real owner of the machinery, Joseph Kieffer being merely his *prête-nom*. One White intervened and alleged a purchase of the machinery by him from Kieffer.

HELD (affirming the judgment of TORRANCE, J., M. L. R., 1 S. C. 284):—That the sale to Kieffer could not be set aside by any evidence less strong than the deed of sale, and that even the admission by Kieffer that the sale was simulated (if such admission existed, which was not the case) could not affect the rights of the purchaser in good faith from Kieffer.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), February 12, 1885. The judgment of the Court below is reported in M. L. R., 1 S. C. 284-286.

The action was an action of revendication by appellant of certain machinery in the hands of Kieffer Bros., two of the respondents. In this action, the respondent White intervened and pleaded, claiming the machinery as his, under a deed of sale from Joseph Kieffer, brother of the other respondents, who was owner of the machinery, as

having bought it from the Coté Counter company by deed of 2nd June, 1884. The appellant alleged that he was owner of the machinery, having bought it from the Coté Counter Company, insolvent; that he, being also insolvent, could not purchase it in his own name, and therefore he purchased it in the name of Joseph Kieffer, who fraudulently sold it to the intervening party, White, who knew of the fraud, and knew that Joseph Kieffer was only a *prête-nom*.

May 25, 26, 1886.]

S. Pagnuelo, *Q. C.*, and *L. N. Benjamin*, for the appellant.

R. Laflamme, *Q. C.*, for the respondent.

RAMSAY, J.:—

This is an action of revendication of certain machinery in the hands of Kieffer Bros., two of the respondents. In this action the respondent White intervened and pleaded to the action, claiming the machinery as being his under a deed of sale from Joseph Kieffer, brother of the other respondents, who was owner of the machinery as having bought it from the Coté Company by deed of the 2nd June, 1884.

The appellant's pretention is that he was owner of the machinery, having bought it from the Coté Counter Co., insolvent; that he, being also insolvent, could not purchase it in his own name and that therefore he purchased it in the name of Joseph Kieffer (by deed of the 2nd June) who fraudulently had sold it to the intervening party, White, who knew of the fraud, and that Joseph Kieffer was only a *prête-nom*.

Questions of the admissibility of evidence, rather than the evidence itself, have to be considered here. It is beyond controversy that Whitehead cannot prove beyond the *contenu de l'acte* between the Coté Counter Company or those replacing it, of which Whitehead was one, and Joseph Kieffer, except what he can draw from Kieffer himself. He might, of course, prove another contract; but this he has not attempted to do. What he says is, this is a simulated contract. That cannot be proved by

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the testimony of witnesses. Appellant never examined Joseph Kieffer. He cross-examined him when brought up by respondent, and out of this he tries to extract a *commencement de preuve par écrit*. It is not a *commencement de preuve par écrit* that is necessary to set aside a written deed, but an absolute confession or another writing (Danty, 238). Again, even if Joseph Kieffer admitted he was acting in fraud, that would not destroy the title of White, unless he was a party to the fraud. That could be proved by testimony. But there is scarcely an attempt to prove it. The learned judge in the Court below has said that even the knowledge of White that Kieffer was a *prête-nom* would not nullify the sale to White. In the abstract, this is true, but in many cases evidence that the purchaser knew he was dealing with a *prête-nom*, in presence of the principal, might go a long way to ripen a suspicion into a decisive presumption. But here there is no evidence at all that he knew that Kieffer was a *prête-nom*.

I am therefore to confirm.

DORION, CH. J.:—

There is nothing to shake the title of Kieffer. He totally denies the alleged understanding between Whitehead and himself. Therefore, whatever may have been understood, there is no legal evidence to destroy the title of Kieffer. We hold that the judgment of the Court below was right in saying that the articles belonged to Joseph Kieffer. He having sold them to White, the latter is entitled to obtain them. There is no proof that White knew of any understanding between Kieffer and Whitehead.

Judgment confirmed.

L. N. Benjamin, attorney for appellant.

Laflamme, Huntington, Laflamme & Richard, attorneys for respondents.

(J. K.)

June 30, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

FELIX KIEFFER ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

EDWARD A. WHITEHEAD,
(*Plaintiff in Court below*),
RESPONDENT.

Contempt of Court—Judgment where person holding moveable property in contempt of order of Court, is adjudged the lawful owner.

While an action of revendication of some machinery was going on, the plaintiff obtained an order of a judge, giving him provisional possession of the machinery. Nevertheless, by collusion between the defendants, the property was put into the possession of White, intervenant. The plaintiff having taken a rule for contempt, the defendants and intervenant were ordered to give over the property within three days, which order was disobeyed.

HELD:—(Reforming the judgment of the Superior Court, M. L. R., 1 S. C. 288), that White was guilty of contempt, and should be fined $100; but that it was no longer expedient to order him to give up the machinery, because in another action, in which judgment was rendered at the same moment as that on the rule, White was declared to be the lawful proprietor of the machinery.

The appeal was from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), April 11, 1885. The judgment of the Court below is reported in M. L. R., 1 S. C. 288. See also the preceding report of *Whitehead & Kieffer & White.*

May 25, 26, 1886.]

R. Laflamme, Q. C., for the appellant.

L. N. Benjamin, for the respondent.

RAMSAY, J. (*diss.*):—

This case is intimately connected with the case of *Whitehead & Kieffer et al.* While the procedure was going

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on in the revendication case, Whitehead obtained an order of Court giving him possession of the machinery on his giving security. This he did, and his possession was fully acquiesced in. Subsequently the appellants took out a *saisie-gagerie* against White, for rent not due, and had one of their workmen appointed as guardian. Under colour of this manifestly collusive action, the machinery was transferred into the custody of White, and out of the control of Whitehead.

The judge condemned the parties to restore the machinery to the custody of Whitehead who had given a security bond of $2,000 for it. It is now contended that there was no ground for this order, and secondly that when judgment was rendered, judgment had been already rendered, declaring White to be the owner of the machinery; that therefore the order to restore was useless.

I am against appellant on both of these points. If the case be appealable at all, while the party remains in contempt, which I am inclined to doubt seriously, the order seems to me just beyond all doubt. Rightly or wrongly, Whitehead had a valid order to hold possession of the machinery, giving security, and the attempt to transfer that possesion to the adverse party by a sham action is fraud. Secondly, the principle is *spoliatus ante omnia restituendus*. To this I know no exception. It is the basis of all possessory action and of the familiar saying of our law, that the *pétitoire* cannot be decided before the *trouble* to the possession has ceased (1 Pigeau, 171). Again, there is another rule of procedure that the judgment dates back to the time of the demand, *semel inclusa judicio, salva manet*. It would be to the last degree inconvenient to permit a party, under any pretext whatever, to possess himself fraudulently or violently of an article, and then to fight his title over it. In the present case the inconvenience is very apparent. Whitehead has given security for the machinery, and White has got possession by a totally different title. That is, Kieffer Bros. and Milette are absolved from producing the effects, because they have placed them in the hands of White.

It may perhaps be said that the general rule is that a party will not be obliged to restore that which must instantly be returned to him; but that doctrine does not apply to the case where the possession is *aut vi, aut clam, aut precario*. In a word, Whitehead's possession was rightful, because he possessed by order of a competent jurisdiction, and any fraudulent operation to defeat that possession is null. This class of cases forms an exception to the rule. Orders of Court would be useless where there was an obstinate litigant determined to set the Court at defiance.

DORION, C. J.:—

This is but an incident of the principal contestation as to the ownership of the machinery, which we have just decided in favor of White. We think it useless, therefore, to order that the machinery be given up to Whitehead. The judgment will be modified to that extent. We decide the incident at the same time as the merits, and seeing that White is adjudged to be the owner of the machinery, we will not order that it be given back to Whitehead. Nevertheless, the Kieffers and White were guilty of contempt in not obeying the rule, and therefore they will be condemned jointly and severally to pay $100, with costs of both Courts.

The judgment is as follows:—

"The Court, etc.....

"Considering that the appellants in this cause have committed a contempt of the order of the Superior Court by taking possession of and removing certain articles of machinery seized under a writ of *saisie-revendication* issued at the instance of the respondent, plaintiff in the Court below, and of which the legal possession and custody had been given to the said respondent on his giving security;

"But considering that the question of property as to said machinery has been since finally adjudicated both by the Superior Court and by this Court, and it would be of no practical utility to order the said articles of machinery to be returned to the said respondent;

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"And considering that the said appellants are nevertheless amenable to the said Superior Court and to this Court for their said contempt and for the damages resulting therefrom to the said respondent;

"This Court, reforming the judgment rendered by the said Superior Court, at Montreal, on the 11th April, 1885, doth reject the answers of the said appellants to the rule of the 9th February, 1885, taken by the respondent against the said appellants, and doth maintain the said rule, and condemn the said appellants jointly and severally to pay to the said respondent the sum of $100, with interest, and all the costs incurred, as well in the Court below as in this Court."

Judgment reformed, RAMSAY, J., *diss.*

Laflamme, Huntington, Laflamme & Richard, attorneys for appellants.

L. N. Benjamin, attorney for respondent.

(J. K.)

May 27, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

JAMES GUEST,

(*Plaintiff in Court below*),

APPELLANT;

AND

JAMES M. DOUGLAS,

(*Defendant in Court below*),

RESPONDENT.

Sale by sample—Latent defect—Complaint by purchaser—C. C. Art. 1530—*Reasonable diligence.*

Wine was sold by sample, and accepted by the buyer without comparison, and paid for, and part of it resold by him.

HELD:—That the buyer was not entitled to tender back the wine, after the lapse of more than a year, on the ground that it was of inferior quality.

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Guest & Douglas.

The appeal was from a judgment of the Superior Court, Montreal (MATHIEU, J.), November 17, 1884, dismissing the appellant's action. The judgment was as follows :—

" La cour, etc.A...

" Attendu que le 5 septembre 1881, le défendeur vendit sur échantillon par l'entremise d'un courtier au demandeur, une certaine quantité de vin sherry, provenant de la manufacture de Lacave et Cie., Cadèse, Espagne, pour le prix de $7,374.09, lequel vin fut livré au demandeur par le défendeur vers les 16 et 17 septembre 1881, et payé le 26 septembre 1881, par un billet daté du 20 septembre 1881, à quatre mois de sa date pour la dite somme de $7,374.09 qui fut payée par le demandeur à son échéance ;

" Attendu que le demandeur, par son action intentée le 14 juin 1883, demande la nullité de cette vente, alléguant que ce vin n'était pas semblable aux échantillons à lui remis par le défendeur ; mais qu'il était d'une qualité inférieure et impropre au commerce, et qu'il avait été falsifié, et réclame du défendeur, la dite somme de $7,374.09, montant du dit billet promissoire avec intérêt depuis le 23 janvier 1882, date de l'échéance du billet plus les droits de douane payés par le demandeur, sur ce vin, et une somme de $10,000 pour dommages par lui soufferts et résultant de la vente de ce vin, le demandeur offrant de remettre au défendeur, la quantité de vin qu'il lui restait en mains et de lui donner crédit pour la partie de vin qu'il avait vendue et qui ne lui serait pas renvoyée par les acheteurs ;

" Attendu que le défendeur a plaidé à cette action, d'abord par une défense en droit, alléguant que l'action du demandeur était mal fondée parce que le demandeur ne pouvait obtenir la résiliation de la vente d'une partie seulement de ce vin ; mais qu'il aurait dû demander la résiliation du tout, et offrir de remettre tout le dit vin ;

" Attendu que par jugement de cette Cour, en date du 28 novembre 1883, il a été ordonné preuve avant faire droit sur la dite *défense en droit ;*

" Considérant que lorsque la chose vendue ne forme pas un seul tout, de manière qu'on n'eût pas acheté l'une

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sans l'autre, le vice redhibitoire qui infecte l'une des choses, donne lieu à la résiliation pour le tout, mais que lorsque les choses sont indépendantes les unes des autres la redhibition n'a lieu que pour celles qui sont infectées de ce vice ;

"Considérant qu'il résulte de la preuve qu'une certaine quantité de vin vendue pouvait être d'une qualité inférieure aux échantillons, tandis que l'autre partie aurait pu être semblable, et que sous les circonstances la dite défense en droit était mal fondée, a renvoyé et renvoie la dite défense en droit avec dépens distraits, etc.

" Attendu que le défendeur a aussi plaidé que le demandeur n'a pas intenté son action avec diligence raisonnable, et que le vin en question était semblable aux échantillons, et qu'avant et lors de la vente, le demandeur avait examiné le dit vin et l'avait accepté et en avait payé le prix ;

" Considérant que le demandeur n'a pas intenté son action avec une diligence raisonnable, et que par l'article 1530 du Code Civil l'action redhibitoire doit être intentée avec diligence raisonnable ;

" Considérant que le demandeur n'a pas prouvé que le vin en question n'était pas semblable aux échantillons et que c'était à lui à faire cette preuve, et que dans les ventes de marchandises sur échantillons la résiliation de la vente ne peut être demandée par l'acheteur lorsque la marchandise est conforme à l'échantillon, et que d'ailleurs les échantillons étant restés pendant quelque temps avant le marché entre les mains de l'acheteur, celui-ci eût pu en faire l'analyse et constater par ce moyen le défaut de la marchandise ;

" Considérant qu'il est prouvé que le vin en question n'a pas été falsifié comme l'allègue le demandeur ;

" Considérant que le demandeur a examiné et dégusté le vin en question avant et lors de la vente et que dans tous les cas, il aurait pu connaître les vices dont il aurait pu être affecté ;

" Considérant que par l'article 1523 du Code Civil le vendeur n'est pas tenu des vices apparents et dont l'acheteur a pu lui-même connaître l'existence ;

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"Considérant que le demandeur n'a pas prouvé que le vin en question fût affecté d'aucun vice caché au temps de la vente en question, et que l'acheteur est tenu de prouver que le vice dont il se plaint existait au moment de la vente ;

"Considérant que l'action du dit demandeur est mal fondée et que les défenses du défendeur sont bien fondées ;

"A maintenu et maintient les défenses du défendeur et a renvoyé et renvoie l'action du dit demandeur avec dépens, etc."

May 15, 1886.]

D. R. McCord for the appellant.

L. N. Benjamin for the respondent.

May 27, 1886.]

RAMSAY, J. (for the Court) :—

We are of opinion that the judgment must be confirmed. The wine was sold by sample, and accepted by the buyer, as he says, without comparison with the sample. It was paid for, and part of it resold by the buyer to various parties. The buyer allowed more than a year to elapse, and it is too late for him to tender it back on the ground that the quality was inferior to sample. There was no error in the contract, and the only ground on which it could be set aside was that the wine had a *vice redhibitoire*. In such case, by Art. 1530 C. C., "action must be brought "with reasonable diligence, according to the nature of the "defect and the usage of the place where the sale was "made." An action after seventeen months is not reasonable diligence. It appears, moreover, that the wine was bought by the appellant at a low price, and it is not surprising that some of his customers should have complained of its quality.

Judgment confirmed.

D. R. McCord, attorney for appellant.

L. N. Benjamin, attorney for respondent.

(J. K.)

November 24, 1888.

Coram TESSIER, CROSS, CHURCH, DOHERTY, JJ.

ROBERT L. CADWELL ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

ALEXANDER SHAW,
(*Plaintiff in Court below*),
RESPONDENT.

Art. 1867, *C.C.—Loan to Partner—Promissory note representing loan—Action against firm—Evidence—Entries in books.*

In an action against a firm composed of Cadwell and Henry J. Shaw, for the amount of loans alleged by the plaintiff to have been made by him to the firm, but which were represented by notes signed by Henry J. Shaw alone:

HELD:—That the presumption arising from entries in the books of the firm, purporting to show that the loans were made to the firm, was completely rebutted by evidence that these entries were made by the plaintiff's son, then cashier of the firm, and were subsequently rectified by the firm; and further, by the letters of the plaintiff himself to Henry J. Shaw, which contained an acknowledgment that the loans were made to Henry J. Shaw individually.

2. A partnership will not be held liable under Art. 1867, C.C., for the amount of a loan made to one of the partners, although the money was applied by such partner to the use of the partnership, if it appear that the lender, though he was aware of the existence of the partnership, gave credit to the borrower personally, accepted his promissory notes for the debt, and looked to him as his debtor.

The appeal was from a judgment of the Court of Review, Montreal, PAPINEAU, JETTÉ, MATHIEU, JJ., (JETTÉ, J., diss.), reversing a judgment of the Superior Court, GILL, J.

The judgment of GILL, J., was as follows:—

"The Court, etc.....

"Considering this action is brought to recover from the defendants Robert L. Cadwell and Henry J. Shaw, as carrying on business in co-partnership under the name,

style and firm of "The New York Piano Company," the amount of two promissory notes and interest accrued thereon, one dated on the 20th day of September, 1881, for $910.50, and the other on the 31st day of March, 1883, for $1,100, and both signed by Henry J. Shaw alone, to the order of plaintiff; the said plaintiff alleging in his declaration that these two notes were so signed and given to him for money loaned by him to the said firm, the New York Piano Company, and of which the said firm had the benefit; to which the defendant pleaded, that the said firm did not get or borrow any amount of money from the plaintiff, or ever have any business transaction with him, but that the transaction was entirely between the plaintiff and his brother, Henry J. Shaw, personally, and not for the firm;

"Considering the plaintiff has failed to prove the material allegations of his declaration as against the said New York Piano Company, the fact of his having been credited in their books for the amounts of said notes or part of them, credit which was subsequently intervested, is overruled by abundance of proof there is in the whole case that the loans were made by the plaintiff to Henry J. Shaw personally, to whom he had been applying the whole time for a settlement, even offering him to renew the notes and give him delay, provided the said New York Piano Company would endorse them;

"Doth consequently dismiss the action with costs against the plaintiff, *distraits*, etc."

The judgment in review, reversing the above judgment, was as follows:—

"La Cour, etc.....

"Considérant que le demandeur poursuit la New York Piano Company composée de Robert L. Cadwell et de Henry J. Shaw, les deux défendeurs, pour le montant en capital et intérêts de deux prêts constatés par billets, l'un de $910.50 en date du 28 septembre 1881, et l'autre pour $1,100 en date du 31 mars 1883;

"Considérant que le demandeur allègue que ces prêts ont été réellement faits à la maison des défendeurs, que

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l'argent ainsi prêté a été employé dans les affaires de cette maison qui en a eu le profit et les avantages ; que les billets en question ont été signés par Henry J. Shaw, le gérant de la maison des défendeurs dûment autorisé à signer pour la dite maison et qu'ils étaient faits payables au bureau de "The New York Piano office here ;"

"Considérant que les défendeurs nient spécialement toutes les allégations de la demande, et nommément que les dits prêts aient été faits aux défendeurs, et qu'ils allèguent au contraire que les billets ont été consentis et signés par Henry J. Shaw pour les affaires de la maison, Henry J. Shaw & Co., composée du demandeur et du dit Henry J. Shaw, et qu'ils (les défendeurs), n'ont jamais eu occasion ni besoin d'emprunter aux dates mentionnées dans la demande ; que la maison Henry J. Shaw étant devenue embarrassée dans ses affaires aurait fait cession de ses biens entre les mains de M. Arthur M. Perkins, devant Kittson, notaire, le 15 novembre 1884, et qu'en réglant les comptes entre le demandeur et Henry J. Shaw, après cette cession, il fut établi que déduction faite du montant de ces deux billets le demandeur redevait encore à Henry J. Shaw $1,935, et que le demandeur avait reconnu plusieurs fois que ces deux billets étaient les billets personnels du dit Henry J. Shaw ;

"Considérant que le demandeur a prouvé les allégations nécessaires au maintien de sa demande, et spécialement que les dits prêts ont été faits à la société ou compagnie des défendeurs et entrés dans leurs livres et l'argent employé dans leurs affaires, le tout à la connaissance du défendeur Cadwell qui gérait alors les affaires des défendeurs à Winnipeg où les défendeurs avaient une succursale de leur maison et à la connaissance du défendeur Henry J. Shaw qui dans le même temps gérait les affaires de la maison à Montréal, et qu'il était entendu entre les défendeurs que les billets de la maison ne seraient pas signés au nom de celle-ci "The New York Piano Company," mais au nom de Henry J. Shaw seul, et que, après les entrées faites sur les livres de la maison des défendeurs pour faire disparaître en apparence la responsa-

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bilité de celle-ci concernant des prêts, cette responsabilité resterait à la charge de la compagnie susdite pour une somme considérable même en acceptant ces entrées comme légitimement et régulièrement motivées par des transactions actuellement faites, ou des erreurs constatées, ce qui ne peut être accepté attendu qu'il n'est fait mention aux livres des défendeurs d'aucune erreur ni d'aucune transaction justifiant ces entrées tendant à détruire la responsabilité de la maison des défendeurs, et que la preuve n'en a pas fait découvrir ;

" Considérant que les défendeurs n'ont pas prouvé les allégations de leurs défenses, et spécialement qu'ils n'ont pas prouvé que les prêts en question eussent été faits à la maison " Henry J. Shaw & Co.," ni que ces prêts ou les billets qui en sont la preuve eussent été entrés dans les livres de cette dernière maison à leurs dates respectives ou vers ces dates, et que les dits billets ne paraissent dans l'état des affaires de la maison Henry J. Shaw & Co. que plus de deux ans après leurs dates, et même après la cession de biens faite devant maître Kittson le 14 novembre 1884 ;

" Considérant qu'il y a erreur dans le susdit jugement du 26 mars dernier ;

" Renvoie et annule le dit jugement du 26 mars dernier (1887), et procédant à rendre le jugement qui aurait dû être rendu en première instance, renvoie les défenses des défendeurs et condamne ces derniers à payer au demandeur la somme de $2,464.42, montant en capital et intérêts accrus jusq'au 28 d'avril 1886, date de l'action sur le montant des dits deux billets, et les dépens tant en Cour de première instance que de cette Cour de Révision, distraits, etc."

(L'honorable juge JETTÉ ne concourt pas dans ce jugement).

Sept. 19, 1888.]

Geoffrion, *Q. C.*, and *Carter*, for the appellants :—

Coming to the question of law which arises, it will be contended on the part of the respondent that the appellants are liable under Article 1867 of the Civil Code,

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which says:—"The partners are liable for obligations "contracted by one of them, in his own name, only when "the obligation is for objects which are in the usual "course of dealing and business of the partnership, or "are applied to its use." And it will be said that in the present case the appellants are liable, because, as the respondent says, the moneys were applied to the use of the business of the appellants. It is submitted that the article in question has no application to the present issue. The case of *Maguire & Scott*, referred to in the authorities under Art. 1867, is entirely different from the present one. In that case it was a purchase of goods by one partner in his own name, the seller being in ignorance of the partnership, but the goods went into the partnership business at once, and the Court held the partnership liable.

For the sake of argument, let us suppose that A lent B a thousand dollars as part of his capital to form a partnership with C; could A sue the partnership so formed for the thousand dollars, on the ground that the partnership had profited by the transaction? Surely not, and yet that is what respondent is attempting to do in the present instance.

At the time of the making of the notes the respondent was aware of the appellants' partnership, but he did not give credit to the appellants but to his brother Henry J. Shaw.

The law is very clearly laid down in Pothier, (Ed. Paris, 1825,) Société, § 101, p. 489; Story, Partnership; 6th Ed., paragraphs 135, 137, 140, Note I; Pont, Société, Vol. 7, No. 652.

Falconer for the respondent:—

Under Art. 1867, C.C., it is enough to show that the moneys were "applied to the use of the partnership." The article is formal, and is based on the case of *Maguire & Scott*, 7 L. C. R. 451, (see report of codifiers, Vol. 3, p. 30 on Partnership, No. 32,) a much weaker case than the present, for there the plaintiff admitted that he had no intention of charging the defendant. Again, even if it

should be considered from the letters produced that respondent looked on H. J. Shaw alone as his debtor, it is quite as plain from the appellants' books, that they looked on plaintiff as their creditor. In such a mutual difference of opinion, the equitable course would be that the parties who had the benefit of the moneys should pay him who advanced it. There is, however, nothing in these letters which contradicts respondent's present claim. Henry J. Shaw did borrow the money, but as representing the appellants, and for them, and the fact that it was the firm's debt, made it none the less his; and when it is considered that he was the only member of the firm in Montreal, and is the respondent's brother, it is not to be wondered at that the respondent, instead of writing formal letters to the former, wrote to his brother asking for a settlement of his claim.

CROSS, J.:—

The present action was brought by Alexander Shaw against Robert L. Cadwell and Henry J. Shaw, alleged to be carrying on business at Montreal under the firm name of the New York Piano Company, upon two promissory notes signed by and in the name of Henry J. Shaw, made payable to the order of Alexander Shaw, the plaintiff, now respondent, alleged to be for monies loaned by said Alexander Shaw to the New York Piano Company, whereof Henry J. Shaw was the managing partner at Montreal, with authority to sign for the firm, who received and benefited by the money which was used in their business; that the notes in question, signed by and in the name of Henry J. Shaw, were really the notes of the New York Piano Company whose business at Montreal was conducted by the said Henry J. Shaw as managing partner, and who signed his own name to notes meant to be for the business of the New York Piano Company.

The appellants, Robert J. Cadwell and Henry J. Shaw, pleaded to the action specially denying that any such loan was ever made to them, and further that all such

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transactions as were referred to in plaintiff's declaration were transactions between the respondent Alexander Shaw and the appellant Henry J. Shaw, which had nothing whatever to do with the business of the appellants and were in no way connected therewith; that the promissory notes in question were given by the appellant Henry J. Shaw for the business of the firm of Henry J. Shaw & Co., composed of the respondent and Henry J. Shaw. That Henry J. Shaw was not the managing partner of the appellants at Montreal, and was never authorised to make said promissory notes for them, nor were they their notes, nor were they liable for the same. That they never borrowed any money from respondent nor owed him anything. By a further plea they alleged that the respondent and the appellant Henry J. Shaw, carried on business in partnership at Montreal under the firm of H. J. Shaw & Co. That the notes in question were given by the appellant Henry J. Shaw to the respondent Alexander Shaw, in the course of business transactions between them in which the appellants had no interest. That the firm of Henry J. Shaw & Co. became insolvent and made an assignment of their estate on the 15th November, 1884; and that after making allowance to the respondent of the amount of the notes in question, he still remained a debtor to the appellant Henry J. Shaw in a balance of $1,985. That respondent frequently acknowledged that the notes in question were the personal notes of Henry J. Shaw.

Evidence being taken on the issues thus joined, the Superior Court presided over by Hon. Mr. Justice Gill, on the 26th of March, 1887, dismissed the action, but the Superior Court in review on the 31st May, 1887, reversed this judgment and awarded the respondent $2,464.42, the amount of the notes in question, Mr. Justice Jetté dissenting. The judgment is thus supported by two judges with the opinions of two other judges against it. The present appeal is from this judgment of the Superior Court in review.

I think the first judgment, viz. that of the Hon. Mr.

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Justice Gill, is the most in conformity to the law and justice of the case. In the first place, the fact of the notes being signed by Henry J. Shaw individually without any sign or indication that they were so signed for any partnership or in any other interest save his own, forms a strong presumption that he alone was debtor on said notes. This is not overcome by the fact that Henry J. Shaw gave his own note for the Piano Company's liability to the *Witness* newspaper, the only proved instance of his doing so, nor that he may have given his own notes for some other liabilities of the Piano Company. He may have consented to become responsible for these liabilities, which would be the result of his so giving his signatures, but if in such particulars he acted for the company, there would be no means of distinguishing between his own proper individual liabilities and those of the firm, and in every case the firm must be liable for his individual debts signed in his own name, because there would be no means of distinguishing between his own individual debts and those of the partnership. A more plausible argument for the liability of the company is to be found in the entries in their books, which are claimed to be credits to Alexander Shaw as of monies loaned by him to the firm, if these stood alone and unexplained; but it is shown that they were traceable to the action of J. W. Shaw, the son of the plaintiff, then in the employ of the Piano Company as their cashier, and which were by the orders of Henry J. Shaw corrected as soon as perceived, and that, if not in the most scientific way, at least in a manner to shew that he criticised and entirely disapproved of the entries so far as they affected the Piano Company. But if any doubt would seem to be left, it should be considered entirely removed by Alexander Shaw's own letters which contain distinct acknowledgments that the money he advanced was loaned to Henry J. Shaw alone, and not to the Piano Company. Alexander Shaw, in his evidence given in the case, admits that these letters refer to the notes in question. In his letter to Henry J. Shaw, of date the 3rd October, 1884, he says:

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"I have been urging you to give me the money you bor-"rowed from me." In his letter to the same of date the 1st of July, 1885, he says: "As to my giving security, I "did suppose you have that in your own hands in the "shape of money loaned." Again, in his letter to the same, of date the 10th July, 1885: "If you will give se-"curity for my claim, I will give your notes as security "for yours." In a like letter of date the 6th July, 1885, he speaks of the money which Henry J. Shaw had borrowed from him, and more particularly in the letter written by him from Baltimore to his brother, said Henry J. Shaw, of date the 26th January, 1885, he says: "It is "necessary for me to have the cash I loaned you on the "notes I hold. I may say here that if it is impossible for "you to pay the money now, I am willing to take a "renewal of them for three months endorsed by the New "York Piano Company or the Piano Company's notes "three months for the amount."

Surely no acknowledgment of the true state of the case could be more formal than contained in these letters; they seem to me to remove all doubts as to the party to whom Alexander Shaw loaned his money, and the party who is liable on the notes sued upon. If, as has been contended, the money or any part of it, found its way into the funds of the New York Piano Company, it must have done so by an advance or payment from Henry J. Shaw, who was the borrower thereof from Alexander Shaw, and the advancer or payer thereof to the Piano Company. There seems to be a strong reason for Alexander Shaw being impelled to throw the liability on the Piano Company, seeing that he was a partner with his brother, Henry J. Shaw, in the furniture business, under the name of Henry J. Shaw & Co., which firm became insolvent and made an assignment for the benefit of their creditors, and in the winding up of that businees, there is at least a probability that Alexander Shaw will owe his brother, Henry J. Shaw, more than enough to compensate the notes in question. He is consequently strongly interested in urging his claim against the Piano Com-

pany, a solvent firm, rather than have it extinguished by the set off against it of the sum he may owe his brother in accounting with the firm of Henry J. Shaw & Co. I therefore conclude that the judgment of the Court of Review should be reversed, and the judgment of Mr. Justice Gill restored.

CHURCH, J.:—

I desire to say this: that I concur in the judgment with very great hesitancy and difficulty. If it had not been for some statements made by the respondent himself I would be for maintaining the judgment. But in view of the declarations of the party himself I am constrained to concur in the conclusion of my brother judges.

DOHERTY, J.:—

I have also had much difficulty in concurring in the present judgment. The fact which influences me to do so is this: The respondent offered to give delay if Henry J. Shaw would get the Piano Company to endorse his notes. If respondent's pretension be correct he already held the Piano Company, whose endorsation he was seeking to obtain as a condition of renewal.

The judgment is recorded as follows:—

"The Court, etc.....

"Considering that the said Alexander Shaw failed to prove the material allegations of his declaration as plaintiff in this cause, and more especially failed to prove that the promissory notes on which he has brought the present action were the promissory notes of the New York Piano Company or of the appellants carrying on business by that firm name, or that the respondent had lent to the appellants the sum of money represented by the said promissory notes;

"Considering that there is error in the judgment rendered by the Superior Court in Review in this cause at Montreal, on the 31st of May, 1887;

"And considering that there is no error in the judgment rendered in this cause by the Superior Court, at Montreal, on the 26th of March, 1887;

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"The Court of Our Lady the Queen now here doth cancel, annul, set aside and reverse the said judgment so rendered by the Superior Court in review, and proceeding to render the judgment which the said Superior Court in review ought to have rendered, doth in all things affirm and hold for good and valid the said judgment so rendered by the Superior Court at Montreal, on the 26th of March, 1887, which is in all things restored and declared to have full force and effect, and doth condemn the said respondent to pay to the appellants the costs in this cause as well in the Court below as in appeal."

Judgment of C. R. reversed.

Carter & Goldstein, attorneys for appellants.

Robertson, Fleet & Falconer, attorneys for respondent.

(J. K.)

December 21, 1888.

Coram DORION, CH. J., CROSS, CHURCH, BOSSÉ, JJ.

WILLIAM F. LEWIS ET AL.,

(*Defendants in Court below*),

APPELLANTS;

AND

CHARLES H. WALTERS,

(*Plaintiff in Court below*),

RESPONDENT.

General agent—Person held out to the public as—Authority to draw bill—Evidence—Loss of bill filed as exhibit—Security.

The appellants, W. F. L. and J. L. L., who were carrying on an ordinary business in Montreal under the firm of W. F. L. & Co., also appointed one J. H. Wilkins as their agent and manager to carry on a business on their account under the name of J. H. Wilkins & Co. It was proved that Wilkins was in the habit of endorsing bills receivable

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with the name of the firm, and that he sometimes drew bills on customers. The respondent discounted one of these bills in good faith, in the same manner as he had discounted similar bills previously.

HELD:—1. That the fact of Wilkins' name being given to the business, and its being conducted by him, whether he was a partner or not, was sufficient to hold him out to the world as a general agent; and appellants were liable to the respondent for the amount of the draft so discounted, whatever might be the use to which Wilkins, without respondent's knowledge, applied the proceeds. (See also *Lewis & Osborn*, M. L. R., 2 Q. B. 353.)

2. Where the bill of exchange on which the action was based, filed by the plaintiff as an exhibit, disappeared from the prothonotary's office, the plaintiff was entitled to judgment for the amount, notwithstanding the loss of the instrument, on giving security to the parties liable, as provided by C. C. 2316.

The appeal was from a judgment of the Court of Review which reversed a judgment of the Superior Court (DOHERTY, J.), January 31, 1885, and condemned the appellants to pay the amount of the draft sued on.

The judgment of the Superior Court was as follows:—

"The Court, etc.....

"Seeing that plaintiff's motion to amend was filed on the 12th of December, 1884, and long after the final hearing of this cause, and without notice to defendants; and further that there is no proof of record that can support the matter of said motion or to which it can be applied;

"Doth reject said motion with costs.

"And on the merits:

"Considering that as against the affidavit of defendants in support of their defence to this action and upon the merits, plaintiff has failed to prove the allegations of his declaration in this cause as well as of said motion, and that defendants have made good their said defence;

"Doth dismiss this action with costs, *distraits*, etc. *Sauf à se pourvoir*."

The judgment in review (JETTÉ, LORANGER, CIMON, JJ.), September 30, 1885, was as follows:—

"La Cour, etc.....

"Attendu que le demandeur réclame le paiement d'une traite tirée par les défendeurs faisant affaires sous le nom de "J. H. Wilkins & Company," à l'ordre du demandeur

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sur le nommé Howard, le 2 février 1883, laquelle traite n'a pas été acceptée par le dit Howard et a été protestée suivant la loi ;

" Attendu que les défendeurs plaident que cette lettre de change n'a pas été signée par eux ni par aucune personne autorisée par eux ;

" Considérant qu'il est en preuve que les défendeurs et le nommé J. H. Wilkins faisaient affaires ensemble en société aux époques mentionnées dans la déclaration, sous la raison sociale de " J. H. Wilkins & Company," que le dit Wilkins était le gérant des affaires de la dite société et passait dans le public pour être autorisé à signer les billets et les traites nécessaires pour les fins de ce commerce ; que le dit Wilkins a signé un grand nombre de traites du nom de la société " J. H. Wilkins & Company," qui ont été escomptées suivant le cours ordinaire du commerce ;

" Considérant que le demandeur a escompté la traite en question de bonne foi et dans la croyance que le dit Wilkins était autorisé à la signer comme ci-dessus alléguée ;

" Considérant que malgré que l'action soit dirigée contre les deux défendeurs seulement, tandis que la société était en réalité tripartite, ainsi que le fait a été constaté subséquemment à l'enquête, il y a lieu de condamner les défendeurs, tels que poursuivis, vu que les dits défendeurs n'ont pas dénommé la dite société par leur plaidoyer et se sont bornés à nier que la traite en question eut été signée par eux ou par aucune autre personne autorisée par eux ;

" Considérant que l'écrit produit au dossier par lequel cette société tripartite est constatée doit être admis comme preuve de l'autorisation que possédait le dit Wilkins à signer la traite en question, mais qu'il n'y a pas lieu d'accorder la motion du demandeur à l'effet d'amender la déclaration ;

" Considérant qu'il a été prouvé que la traite en question a été perdu depuis sa production au greffe avec le rapport de l'action, et que les défendeurs sont en droit de réclamer le cautionnement requis par l'article 2316 du Code Civil ;

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"Considérant qu'il y a erreur dans le jugement dont la révision est demandée, et procédant à rendre le jugement qui aurait dû être rendu;

"La Cour maintient la partie du jugement qui a rejeté la dite motion avec dépens, et prononçant sur le mérite de l'action, condamne les défendeurs conjointement et solidairement à payer au demandeur la somme de $211.81, cours actuel, dont $210.05, montant de la dite traite, et $1.76 pour frais de protêt; avec intérêt, etc.;

"Laquelle condamnation ne sera exécutée contre les défendeurs que lorsque le demandeur leur aura fourni bonne et valable caution qu'ils ne seront pas troublés par aucune autre personne pour le paiement de la dite traite."

Nov. 16, 1888.]

H. Abbott, Q. C., for the appellants:—

The respondent has failed to prove the existence of the draft. It is pretended that it was lost after it was filed in Court, but there is no evidence that it ever was filed. Wilkins, who signed the draft in question, was not a partner in the firm, nor authorized to sign. Moreover, the draft in question was not given for the purposes, or in the ordinary course of the business, of the firm, who received no value for it.

C. B. Carter, for the respondent:—

The draft was duly filed as an exhibit, and was lost subsequently. The judgment is not to be executory until the respondent shall have given security against any further claim in respect thereto. The appellants carried on business under the name of W. F. Lewis & Co., and they also carried on another business under the name of J. H. Wilkins & Co., which was not registered, and was under the management of J. H. Wilkins, who was really a partner in the business. He endorsed the name of the firm on all drafts received, and signed the firm name to notes, receipts, and other documents required in the course of the business. When Wilkins was absent from Montreal, the appellants signed and endorsed these papers. It is proved that Wilkins on several occasions discounted notes of the firm of J. H. Wilkins & Co. with the respond-

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ent, and he was held out to the public as a partner. In these circumstances it is contended that the firm has properly been held liable for the draft.

CROSS, J. (for the Court) :—

The respondent Walters, a private banker, in this action claimed to recover from the appellants, William F. Lewis and John L. Lewis, trading at Montreal under the name of J. H. Wilkins & Co., $210.05, amount of a draft dated at Montreal, the 2nd February, 1883, which he, Walters, in his declaration alleged was made by them, the appellants, and by them drawn upon R. W. Howard, of Toronto, dishonored and returned to him, Walters, protested for non-acceptance.

The appellants, William F. Lewis and John L. Lewis, by their plea to the action denied that they or either of them, or any one by their authority or with their knowledge, ever signed the draft in question, or that they or either of them ever received any value or consideration for the same. William F. Lewis, one of the appellants, supported this plea with the affidavit required in such cases.

When the case came on for proof, the draft was not forthcoming, and it became a question whether it had ever been filed in Court. After several postponements Walters had leave granted him by the Court on his motion to file a copy to stand in place of the original, and proof was produced on both sides as regards the filing of the draft, the deduction drawn from which is that the draft must have been delivered into the prothonotary's office, but what then became of it does not appear; it is, however, made perfectly apparent that the draft had an actual existence and that the declaration must have been framed thereon. The protest also remains which contains a copy of it.

The proof elicits the fact that the appellants had a regular business at Montreal, conducted by themselves, under the name of W. F. Lewis & Co.; that in June, 1880, they conceived it to be to their advantage to establish a

separate business to be owned by them, but to be under the management of Mr. John H. Wilkins, and to be carried on under the name of J. H. Wilkins & Co. This business was established and continued until some time in June, 1883. The draft in question in this cause was made by this firm of J. H. Wilkins & Co.

Louis Ennis, a clerk of Walters, was examined as a witness, and states that the draft in question was written and signed by Wilkins, in the name of J. H. Wilkins & Co., at the office of Walters, and was then immediately discounted by Walters, the cheque for the proceeds being handed to Wilkins, less $5, amount of a small loan for which Wilkins was indebted to Walters. The same witness proves that during about three preceding years Walters had discounted for J. H. Wilkins & Co. eighteen other drafts, which had all been paid, the one in question, the nineteenth, being the only one which had not been paid.

From the evidence of Robert W. McPherson, the confidential clerk of W. F. Lewis & Co., it further appears that during the time the business of J. H. Wilkins & Co. was carried on, Wilkins was in the habit of endorsing the name of the firm occasionally to bills receivable, and also sometimes drawing drafts on customers. It may be inferred from the statements of this witness that the relation in which W. F. Lewis & Co. stood to the firm of J. H. Wilkins & Co. was that of partners, although he says that the partnership was not registered.

During the enquête there was produced by the appellants themselves the agreement between W. F. Lewis & Co. and Wilkins for the establishment of the business of J. H. Wilkins & Co., by which it appeared that W. F. Lewis & Co. were to establish a store under the name of J. H. Wilkins & Co., to be managed for them by John H. Wilkins as their agent and manager; that J. H. Wilkins & Co. would carry on the business under the name of J. H. Wilkins & Co. for the benefit and on behalf of said W. F. Lewis & Co.; that, after deduction of charges, the property should be divided equally between W. F. Lewis

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& Co. and John H. Wilkins, but the said business should not be a partnership.

The appellants have established by Hugh F. Kerrin, who was a clerk in their employ, keeping the books of J. H. Wilkins & Co., that the draft in question was not entered in their bill book, and that he never knew of Wilkins drawing a draft or signing a note in the name of the firm.

The appellants have further, by the examination of Walters, attempted to establish a presumption that he knew or ought to have known that Wilkins was getting the bill in question, as well as other bills previously discounted, for himself and not for the business of J. H. Wilkins & Co., and that Walters discounted them on the faith of Wilkins alone. This they claim to have shown from various circumstances, such as the admission by Walters that he knew previous to the discount of the bill in question that there had been litigation between Wilkins and the Lewis', and that $5 of the proceeds were retained by Walters to pay a personal loan which Walters had made to Wilkins.

After the case had been heard, Walters moved to file a special answer, which motion was refused.

By the first judgment in the Superior Court the action was dismissed, but in review, the appellants were held liable, and condemned to pay the draft, Walters, however, being required to give them security that they would not be troubled on account of the lost draft. From this judgment the present appeal is instituted.

The appellants submit that they are not liable under the circumstances of the case, for the following reasons :—

1. Because the plaintiff failed to prove by legal evidence the copy of draft produced, or the existence and loss of the original.

2. Because the plaintiff failed to give or offer security before proceeding upon the supposed copy.

3. Because the proof shows that the draft in question was not signed by the defendants in the action, or either of them, as alleged, and plaintiff has consequently failed to prove the allegations of his declaration.

4. Because Wilkins, who signed the draft in question, was not a partner in the firm, nor authorized to sign.

5. Because the draft in question was not given either for the purposes, or in the ordinary course of the business of the firm, who received no value therefor.

6. Because the respondent knew, or is legally presumed to have known, the want of authority in Wilkins.

As to the first, I think it is sufficiently proved that the draft was lost, and it is abundantly established that it existed and should be paid, unless the appellants could show a good reason for resisting its payment.

As to the second, the draft only became missing after the suit was commenced. If it had been missing prior to this event it might with more reason have been urged that the plaintiff should have offered security; besides the respondents are secured by the judgment all they are entitled to in this respect.

As to the third, I think the respondent's allegation that the appellants, trading and carrying on business as co-partners under the name and style of J. H. Wilkins & Co., made the draft in question, is sufficiently supported by the proof that it was made and signed by their manager and general agent, John H. Wilkins.

As to the fourth, it is not really material whether Wilkins was a partner or not. He was manager of the business, and as such held forth to the public as a general agent; the very fact of his name being given to the business and participating in conducting it, ought to be held sufficient to give him the character of general agency. Usual employ is evidence of a general authority, and a general authority is supposed to continue until its determination is notorious.

As to the fifth, whether the draft was given for the purpose of the business or not, could not affect Walters' rights unless he knew that the proceeds of the draft were being misapplied when he made the discount.

As to the sixth, I do not find by the proof that Walters knew or should be presumed to have known, that Wilkins was wanting in authority to sign the draft.

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The circumstance most tangible in support of the appellants' theory in this respect is that $5 of the proceeds of the draft were retained by Walters in payment of a personal loan he had made to Wilkins. This is not of sufficient importance to show any general misapplication of the funds; it was probably a mere convenience, on the presumption that Wilkins would make this right as between him and the firm.

The consequence of this view of the case is that the Court here confirms the judgment of the Superior Court in review.

Judgment of C. R. confirmed.

Abbotts & Campbell, attorneys for appellants.

Kerr, Carter & Goldstein, attorneys for respondent.

(J. K.)

December 21, 1888.

Coram DORION, CH. J., TESSIER, CROSS, CHURCH, BOSSÉ, JJ.

FREDERIC A. LUSIGNAN,

(*Plaintiff in Court below*),

APPELLANT;

AND

CESARIE RIELLE ET VIR,

(*Defendants in Court below*),

RESPONDENTS.

Lessor and lessee—Arts. 887-899, *C. C. P—Jurisdiction of Superior Court—Declinatory exception.*

Massé & Co. sub-let to respondent certain premises held by them under a lease; and they also leased sundry moveables therein for a certain sum payable in monthly instalments: the respondent also becoming liable for the rent payable to the proprietor of the premises under the lease to Massé & Co. In case of default to pay the instalments the right to resiliate the lease was stipulated. Massé & Co. transferred their rights to the appellant, who brought an action to resiliate the lease on the ground of default to meet the instalments. The proceedings were under the special procedure provided by C. C. P., 887 *et seq.*

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HELD:—(Reversing the judgment of the Superior Court, M. L. R., 3 S. C. 197), that the appellant having the right to resiliate for default, the action was improperly dismissed on a declinatory exception.

Per BOSSÉ, J.: That, in any case, the Superior Court having jurisdiction, the objection to the summary procedure was matter to be pleaded by exception to the form, and not by declinatory exception.

The appeal was from a judgment of the Superior Court, Montreal (GILL, J.), June 3, 1887, maintaining a declinatory exception, and dismissing the action. The judgment of the Court below is reported in M. L. R., 3 S. C. 197. The facts are stated in the opinion of BOSSÉ, J.

Nov. 20, 1887.]

Geoffrion, Q. C., and *P. H. Roy*, for the appellant:—

Le demandeur se résume en disant: le jugement final en cette cause doit être renversé:

1o. Parce que la Cour Supérieure a jurisdiction sur la matière en litige;

2o. La seule chose dont les défendeurs devaient se plaindre, en supposant leurs prétentions bien fondées, c'était que les délais d'assignation étaient trop courts, et ils devaient le faire par exception à la forme, suivant l'article 116; ne l'ayant pas fait, ce défaut serait couvert, si toutefois il a existé (Voir art. 119 du Code de Procédure Civile);

3o. Parce que l'exception a été produite trop tard et parce qu'il n'y a pas été apposés les timbres voulus par la loi; les timbres qui s'y trouvent ayant été payés pour le plaidoyer au mérite;

4o. Parce que la cause a été irrégulièrement inscrite, et que toute la procédure qui a été faite sur l'inscription produite par les défendeurs le 7 avril 1887 est nulle et illégale.

C. Lebeuf, for the respondents:—

Dans leur exception déclinatoire, les intimés disent que cette action est basée sur un bail de meubles; que la somme réclamée est seulement due pour le loyer de ces meubles, et non pas pour le loyer de l'immeuble, qui est payable par les défendeurs à une autre personne que le demandeur.

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Ils allèguent, de plus, comme question de fait, qu'ils ont toujours payé le loyer du dit immeuble au représentant de la succession Biron, M. Cyprien Cholette, qui seul avait le droit de prendre une expulsion contre eux, au cas de non paiement du loyer; lequel droit, ajoutent-ils, l'appelant ne réclame pas et ne cherche pas à exercer par sa dite action, n'alléguant aucun loyer dû sur l'immeuble, mais simplement sur les meubles loués; et ils concluent au renvoi et débouté de cette action, sauf à l'appelant à se pourvoir devant le tribunal compétent, vu que la Cour Supérieure, *siégeant en expulsion*, en vertu de "l'Acte des Locateurs et Locataires," et en vertu de l'article 887 et suivants du Code de Procédure Civile, n'a pas de juridiction dans une cause sur un bail de meubles, et conséquemment n'a pas de juridiction en cette cause.

Bossé, J.:—

Par acte du 14 août 1886. Massé et autres ont loué à la défenderesse intimée, pour deux ans et deux mois, une maison et auberge qu'ils tenaient eux-mêmes à loyer de la succession Biron, et certains meubles meublants de maison et de buvette qui leur appartenaient.

Le loyer stipulé fut de $700 pour la durée du bail, payables $50 par mois au bailleur, et de plus à la charge de payer à la succession Biron le loyer et les taxes que Massé et al. devaient lui payer en raison de leur propre bail.

L'action contient de plus une stipulation à l'effet que si l'intimée payait tous les termes du loyer stipulé pour les meubles loués, elle en deviendrait propriétaire après le dernier paiement fait.

Par acte du 17 août suivant, Massé et al. ont transporté à l'appelant Lusignan les $700, loyer des meubles; ce transport a été signifié, et par acte du 18 janvier 1887 il fut déclaré que l'intention des parties au transport était de subroger le cessionnaire dans tous les droits d'expulsion et autres que les cédants pouvaient eux-mêmes avoir contre l'intimée en vertu de leur bail; cette subrogation fut spécialement stipulée de nouveau et en autant

que faire se pouvait, et cet acte a été aussi signifié à l'intimée.

Le 28 février suivant la présente action fut portée. Elle réclame six termes de loyer des meubles de $50 chacun, et conclut à la résiliation du bail du 14 août 1886, à l'expulsion de la défenderesse des lieux loués et à la mise en possession du demandeur de la maison et de tous les meubles loués. Une saisie-gagerie pour saisir-gager les meubles appartenant à la défenderesse et une saisie-revendication pour saisir les meubles loués et en rentrer en possession accompagnent l'action.

Un jour franc de délai d'assignation a été donné, mais il n'apparaît pas autrement par le bref, sauf quant à l'heure de comparution, midi, que la défenderesse soit ou ne soit pas assignée en vertu des dispositions spéciales concernant les locateurs et locataires.

La défenderesse a comparu le jour même du retour du bref, et le cinquième jour après a produit des défenses au mérite, et une exception déclinatoire dans laquelle elle allègue que l'action n'était que pour un bail de meubles, que les procédures sous l'acte des locateurs et locataires ne peuvent avoir lieu que pour les seuls baux d'immeubles, et elle conclut à ce qu'il soit déclaré que la Cour devant laquelle l'action était portée n'avait pas jurisdiction et devait, pour cette raison, renvoyer l'action.

Cette défense a été maintenue, et c'est du jugement qui l'a maintenue que le présent appel a été interjeté.

L'on voit qu'il ne s'agit au fond que de la question de savoir si l'action telle que portée résulte des rapports entre locateurs et locataires dans le sens des articles du Code de Procédure qui donnent une jurisdiction sommaire pour entendre et décider ces affaires, et si le défendeur devait soulever cette question par exception déclinatoire en niant la jurisdiction de la Cour Supérieure ou bien plaider par exception à la forme que l'action n'était pas susceptible d'instruction sommaire, et qu'on ne lui avait pas donné les dix jours de délai d'assignation voulus pour les cas ordinaires.

Je crois qu'il n'y a qu'une Cour Supérieure, et que cette

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Cour siégeant, soit pour les affaires ordinaires, soit pour les affaires de locateurs et locataires est toujours la Cour Supérieure, procédant dans un cas suivant le cours ordinaire de la procédure, et dans l'autre suivant la procédure plus sommaire régie par les articles 887 et suivants du Code de Procédure.

Voir articles 887, 888 et 890.

Ainsi ces actions sont portées devant la Cour Supérieure ou la Cour de Circuit, suivant le cas, et lorsque les articles 890 et seq. établissent des délais plus courts que pour les causes ordinaires, loin de créer une jurisdiction spéciale et séparée, ils ne nous parlent que des délais de procédures et de séances de la Cour hors des termes et pendant la vacance.

L'article 889 précise encore davantage cette idée, et et enfin l'article 898 déclare que le jugement, (celui de la Cour Supérieure ou Cour de Circuit), peut être rendu pendant ou en dehors des termes.

L'acte 51-52 Vict., chap. 26, en décrétant que certaines matières requérant plus de célérité que les autres seront instruites de la manière sommaire indiquée par cet acte, n'a pas fait autre chose que ce que les articles 887 et seq. du Code avaient déjà fait pour les poursuites entre locateurs et locataires. Il a reproduit les anciennes dispositions et les a fait applicables en même temps aux locateurs et locataires et aux diverses autres classes d'affaires qu'il mentionne.

L'on ne saurait non plus là trouver l'établissement de deux Cours Supérieures distinctes, ni la création de deux jurisdictions séparées et distinctes de la Cour Supérieure.

L'assignation a lieu devant la Cour Supérieure ou la Cour de Circuit, suivant le montant réclamé, mais les délais sont plus courts et voilà tout.

Cette manière de voir est confirmée par l'application de la 47 Vict., c. 8, s.2, en vertu de laquelle dans le district de Montréal tout jour juridique est jour de terme, et il est possible que cette dernière raison qui ne s'applique pas au district de Québec puisse expliquer la divergence dans les jugements rendus sur ce point dans ces deux districts.

Pour ces raisons je crois que s'il était vrai que l'action ne tombait pas sous les dispositions concernant les locateurs et locataires, la défenderesse devait, non pas nous dire par exception déclinatoire que la Cour Supérieure n'avait pas jurisdiction, et devait, siégeant comme Cour Supérieure, renvoyer l'action pour qu'elle fût de nouveau portée dans la même Cour Supérieure avec un délai d'assignation plus long, mais elle devait dire par exception à la forme qu'on ne lui avait pas donné les délais voulus, et je suis d'opinion que le jugement devrait être infirmé et l'exception déclinatoire renvoyée.

Quant aux autres questions de savoir si le bail de meubles seulement peut donner lieu aux procédures sommaires, et si dans l'espèce il s'agit seulement d'un bail de meubles il n'est pas nécessaire de les discuter, la première raison est pour moi déterminante.

DORION, CH. J. :—

The Court below was of opinion that the clause relating to the movables was not part of the lease. We think this view was erroneous. The appellant, as *cessionnaire* of Massé & Co., had the right to resiliate the lease if the respondent failed to make payment of the instalments of the $700 as they became due. We think, therefore, the agreement to pay the $700 must be treated as part of the lease, and the right to demand the resiliation of the lease having accrued, it was competent for the appellant to avail himself of the special procedure as between lessor and lessee. The *exception déclinatoire*, therefore, as regards the demand for resiliation was not well founded. We reverse the judgment on this ground, without expressing any opinion whether the *saisie-conservatoire* of the moveables could be made under the summary procedure.

The judgment is as follows :—

"La Cour, etc.....

"Considérant que l'appelant, comme cessionnaire de J. A. Massé et Cie., a porté cette action pour faire résilier un bail d'un immeuble et de certains meubles décrits au dit bail ; que ce bail, en date du 14 août 1886, avait été

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fait pour un seul et même prix consistant dans une somme de $700 payable par paiements mensuels en sus du loyer que les dits J. A. Massé et Cie. devaient eux-mêmes payer à la succession Biron, et que l'intimée s'obligea de payer à leur acquit ;

" Considérant qu'il a été stipulé au dit bail que si l'intimée négligeait de faire à leur échéance aucun des paiements convenus, les bailleurs auraient le droit après un avis de trois jours de résilier le bail et de reprendre la possession de l'établissement loué ;

" Considérant que l'appelant comme cessionnaire des bailleurs avait le droit de demander, à défaut de paiement du prix du bail, la résiliation du bail de l'immeuble loué en suivant les procédures sommaires indiquées par les articles 887 et suivants du Code de Procédure, ainsi que les meubles compris dans ce bail comme accessoires au bail du dit immeuble ;

" Considérant que l'exception déclinatoire de l'intimée en autant qu'elle se rapporte à la résiliation du bail est mal fondée, et qu'il y a erreur dans le jugement rendu par la Cour de première instance, savoir, la Cour Supérieure siégeant à Montréal le 3e jour de juin 1887 ;

" Cette Cour casse et annule le dit jugement, et procédant à rendre le jugement qu'aurait dû rendre la Cour de première instance, renvoie l'exception déclinatoire de l'intimée avec dépens sur icelle tant en Cour de première instance que sur l'appel ; et cette Cour ordonne que le dossier soit remis à la Cour de première instance pour y être procédé à l'instruction de la cause ainsi que de droit, cette Cour n'entendant néanmoins rien préjuger quant à cette partie des conclusions de l'appelant par laquelle il demande à être déclaré propriétaire des meubles compris dans le bail, et à ce qu'un bref de saisie-conservatoire émane pour saisir et arrêter ces meubles. L'hon. juge Tessier *dissentiente*).

Judgment reversed.

Roy & Roy, attorneys for appellant.
Lebeuf & Dorval, attorneys for respondents.
(J. K.)

December 21, 1888.

Coram DORION, CH. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

LA COMPAGNIE DU GRAND-TRONC DE CHEMIN DE FER DU CANADA,

(*Defendant in Court below*),

APPELLANT;

AND

LA CORPORATION DE LA VILLE DE ST-JEAN,

(*Plaintiff in Court below*),

RESPONDENT.

Evocation—Art. 1058, *C. C. P.—Rights in future—Penalty of so much per day for not maintaining gates at railway crossings.*

HELD:—Where a railway company was sued for ninety dollars, being the amount of penalties for nine days, under a by-law of a town enacting a penalty of ten dollars per day in the event of the company's making default to erect gates at the intersection of the railway with certain streets, that rights in future within the meaning of Art. 1058 C. C. P., were affected, and the defendant might evoke the action to the Superior Court.

The appeal was from a judgment of the Circuit Court sitting at St. John's, district of Iberville (LORANGER, J.), March 16, 1887, rejecting a demand of the defendant, appellant, for the evocation of the case from the Circuit Court to the Superior Court. The judgment was as follows:—

"La Cour, après avoir entendu les parties sur le mérite de la demande en évocation produite en cette cause, examiné la procédure et délibéré;

"Considérant que le règlement sur lequel repose la présente action, fut-il *ultra vires*, il n'y aurait pas en cela cause d'évocation;

"Considérant qu'en vertu des dispositions de l'Acte spécial de la demanderesse qui régit la matière, la Cour de Circuit a jurisdiction pour connaître, instruire et juger le présent litige;

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Cie. du G. T. & Corp. de St. Jean.

"Considérant que la poursuite a pour objet le recouvrement d'amendes encourues par le passé en raison d'infraction au dit règlement; que le jugement qui sera rendu n'affectera aucun droit futur;

"Considérant que nonobstant l'expiration des délais fixés par l'Acte spécial de la demanderesse pour demander l'annulation du dit règlement, la défenderesse a le recours de droit commun pour en faire prononcer la nullité dans le cas où il serait *ultra vires* et inconstitutionnel;

"Considérant que le dit règlement n'a aucun caractère de permanence et peut être révoqué en tout temps par l'autorité qui l'a édicté;

"Considérant que la demande en évocation est mal fondée;

"Renvoie la dite demande avec dépens, distraits, etc." Nov. 22, 1888.]

G. Macrae, Q. C., and *Paradis*, for the appellant:—

La corporation de la ville de St-Jean, la demanderesse intimée, voulant forcer l'appelante à construire et à maintenir des barrières aux intersections du chemin de fer de l'appelante avec les rues de la ville, a cru devoir passer et adopter, le 3 décembre 1883, sous la prétendue autorité de son Acte d'incorporation par la législature de Québec, (43-44 Vict., c. 62, s. 89, ss. 82) le règlement suivant, savoir:—

BY-LAW NO. 15 CONCERNING GATES.

"Whereas the necessary precautions for public security have not been taken by the Grand Trunk Railway Company of Canada, running through the town of St. Johns and specially through or across the following streets: St. James, St. John, Grant, Jacques-Cartier and Lemoine in said town, and whereas serious and numerous accidents have occurred on account of that want of precaution; whereas it is necessary to have and erect, as is usually done, across the above mentioned streets, where said railroad passes, gates to prevent such accidents and where such gates are not inconsistent with the free use of said railway;

"Therefore the council of the town of St. Johns, in virtue of the powers conferred upon it by its charter, decrees and promulgates as follows:

"The said Grand Trunk Company of Canada and all other companies using said railroad, shall, within one month from the coming into force of the present by-law, erect and place at the intersection of said railroad with said streets St. James, St. John, Grant, Jacques Cartier and Lemoine, in said town of St. Johns, good and solid gates and keep a careful

charge of them so as to prevent accidents and secure the public, and, in default of their so doing, they shall be liable to a penalty of ten dollars a day.

"The present by-law shall come into force fifteen days after the publication thereof."

Il ne s'agit pas, sur le présent appel, de faire décider de la nullité ou de la validité de ce règlement. La seule question à décider est : l'appelante a-t-elle le droit d'évoquer la présente action de la Cour de Circuit à la Cour Supérieure ? Ce règlement, sur lequel est basée cette action, impose *à perpétuité* à la compagnie appelante des charges et obligations très onéreuses, et ce sous une pénalité de dix piastres par jour aussi à perpétuité ; il est donc évident qu'il est très important pour l'appelante de prendre les mesures et procédés voulus pour obtenir un jugement qui décide d'une manière définitive la validité de tel règlement, et qui détermine à la satisfaction des parties leurs droits et obligations.

L'intimée a, le 8 janvier 1887, plus de trois ans après la passation de son dit règlement, intenté contre l'appelante la présente action devant la Cour de Circuit, à St-Jean, pour $90 d'amende, pour ne s'être pas conformée au dit règlement pendant les neuf jours qui ont immédiatement précédé la dite action.

L'appelante a cru devoir évoquer cette cause à la Cour Supérieure, attendu qu'elle entendait plaider la nullité de ce règlement, et que cette action comme le jugement à intervenir en icelle affectait des droits futurs.

La Cour inférieure a renvoyé la demande en évocation et a par là décidé que cette cause n'est pas appelable, pour les motifs énoncés au jugement, lesquels peuvent se résumer comme suit :

1o. En vertu de l'Acte d'incorporation de la demanderesse la Cour de Circuit a jurisdiction pour instruire et juger le présent litige ;

2o. La poursuite a pour objet le recouvrement d'amendes encourues par le passé pour infraction au dit règlement et le jugement qui sera rendu n'affectera aucun droit futur ;

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3o. La défenderesse appelante a le recours de droit commun pour faire prononcer la nullité de ce règlement;

4o. Ce règlement n'a aucun caractère de permanence et peut être révoqué en tout temps par l'autorité qui l'a édicté.

Quant au premier motif du jugement l'appelante ne nie pas que la Cour de Circuit ait jurisdiction pour instruire et juger le présent litige, mais elle prétend que la Cour de Circuit n'a pas cette jurisdiction d'une manière exclusive et qui empêche l'évocation si l'action et le jugement à intervenir sont de nature à affecter des droits futurs. L'Acte d'incorporation de la ville de St-Jean donne bien à la Cour de Circuit jurisdiction pour le recouvrement des taxes et amendes, mais n'enlève nullement la jurisdiction que la Cour Supérieure a de droit commun, comme il a été jugé dans nombre de cas analogues.

Le deuxième motif du jugement renferme le point principal et toute la question à décider, à savoir: si le jugement qui sera rendu en cette cause affectera des droits futurs.

Il suffit de considérer quelles seront les conséquences et le résultat pratique de ce jugement pour voir qu'évidemment il affectera des droits futurs. Le règlement en question en cette cause, dont la défenderesse appelante entend plaider la nullité, impose à l'appelante des charges très onéreuses, qui non-seulement doivent se continuer et subsister à l'avenir, mais qui par leur nature sont évidemment imposées pour toujours, et en conséquence concerne clairement des droits futurs; si ce règlement est jugé valide, l'appelante reste tenue à des charges et obligations pour une valeur très considérable; si au contraire le règlement est jugé nul, l'appelante est entièrement libérée de toutes ces charges et obligations.

Il est évident que le jugement à intervenir sur l'action ne peut condamner ou libérer l'appelante sans juger et décider expressément de la nullité ou de la validité du règlement, et en conséquence, s'il est maintenu que l'appelante n'a pas droit d'évocation, qu'il n'y a pas de droits futurs affectés, il sera par là même décidé que l'appelante

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n'a pas droit d'appel ; le jugement de la Cour de Circuit sera final et aura force de *chose jugée* entre les parties.

Le troisième motif du jugement serait bien fondé si le règlement en question n'était qu'annulable, car alors il aurait force et effet tant qu'il ne serait pas annulé ; mais l'appelante prétend que le règlement est nul, *ultra vires*, et par conséquent elle n'est aucunement tenue de prendre des poursuites pour faire déclarer cette nullité.

Le quatrième et dernier motif du dit jugement, qui dit que le règlement n'a pas de caractère de permanence et peut être révoqué en tout temps par l'autorité qui l'a édicté, est une bien pauvre consolation pour l'appelante, s'il lui arrive d'être condamnée ; car le règlement parait avoir été fait pour durer jusqu'à la fin des siècles, si on réussit à le faire déclarer valable, et d'après les procédés pris par l'intimée pour tâcher de mettre ce règlement à exécution, l'appelante ne peut entrevoir aucune lueur d'espoir qu'elle le révoquera, et considère que ce serait d'une imprudence extravagante de compter sur une telle éventualité.

Béique, *Q. C.*, and *Lafontaine*, for the respondent :—

Le seul motif et la base de la demande d'évocation faite par l'appelante est que la décision qui sera rendue affectera *les droits* futurs de l'appelante non pas à la face du dossier, mais parce qu'elle entend par sa défense plaider que le règlement en vertu duquel elle est poursuivie est nul comme étant *ultra vires*.

Ceci semble devoir suffire pour faire prompte justice de la prétention de l'appelante. L'article 1058 C. P. C. qui règle cette question, dit : "Dans tous les cas où une "action se rapporte à quelque honoraire d'office,

"Droit, rente, revenu ou somme d'argent payable à Sa "Majesté,

"Titre à des terres ou héritages,

"Rentes annuelles ou autre matière qui peuvent affec- "ter des droits futurs :

"Le défendeur peut, avant de faire sa défense au mérite, "évoquer la poursuite ou action."

Cet article est tiré de la section 178 du chap. 83 des

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Statuts Refondus, qui se lit comme suit: "Si une pour-
"suite ou action intentée à la Cour de Circuit se rapporte
"à quelque honoraire d'office, droit ou rente, revenu ou à
"quelque somme d'argent payable à Sa Majesté ou à des
"titres de terres ou ténements, rentes annuelles ou telles
"autres matières ou choses semblables qui pourraient
"affecter des droits futurs, le défendeur pourra avant de
"faire sa défense au mérite évoquer telle poursuite ou
"action."

La présente action ne tombe sous aucune de ces dispositions. Loin d'avoir effet dans l'avenir elle n'a d'objet que pour le passé.

Chaque offense contre ce règlement constitue une action distincte qui dépend uniquement de l'appelante qui encourera la pénalité ou ne l'encourera pas selon qu'elle l'observera ou ne l'observera pas. Le règlement lui-même en vigueur aujourd'hui pourra ne pas exister demain. Si le règlement était injuste ou illégal l'appelante pouvait le contester dans les trois mois qui ont suivi sa publication. Même encore aujourd'hui si le règlement est *ultra vires* comme elle l'allègue, l'appelante a son action de droit commun pour le faire annuler.

On définit les *droits:* les facultés ou avantages que la loi accorde aux personnes. Ces facultés ou avantages découlent soit de la loi elle-même, soit des conventions qui sont la loi des parties, soit d'un fait personnel de l'homme qui constitue lui-même s'il est licite un quasi contrat, et si le fait est illicite un délit ou un quasi délit.

Les *droits futurs* sont donc des droits actuellement nés et acquis mais qui ne sont pas encore exigibles, ou ne le deviennent que par portions.

L'action en cette cause résulte d'un fait d'omission auquel la loi comme sanction attache une pénalité afin d'en assurer l'exécution. Elle ne peut donc affecter les droits futurs de l'appelante de la volonté de laquelle il dépend uniquement d'y donner ou ne pas y donner lieu.

Comme on ne peut pas supposer que l'appelante continuera à violer un règlement fait par l'autorité publique et qu'elle accepte implicitement, on ne peut dire que les

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droits futurs de l'appelante puissent être affectés par la décision qui sera rendu dans la cause.

L'appelante semble admettre cette opinion et pour se créer une évocation, en mettant en avant une prétendue question de droits futurs, elle est obligée d'alléguer dans son *évocation* qu'elle entend attaquer le règlement invoqué comme *illégal*, *ultra vires*, *nul et de nul effet*.

Il est impossible d'asseoir une théorie et encore moins une décision sur les points qui seront soulevés par la défense, et il sera assez temps de la considérer lorsqu'elle sera produite. Ce sera alors à l'intimée à considérer la position qui lui sera faite, et s'il y a lieu elle pourra se prévaloir de la dernière partie de l'article 1058 qui permet au demandeur d'évoquer lorsque la défense met en question le titre du demandeur de manière à infirmer ses droits à l'avenir. En attendant il n'y a pas lieu à l'évocation parce qu'à la face de l'action et du dossier il ne peut être question de droits futurs. Car il ne peut découler du règlement qu'ayant été violé dans le passé il continuera à l'être dans l'avenir.

La conséquence d'une évocation permise dans ces circonstances, sur le fondement de moyens imaginaires ou réels que la défense entend de bonne foi soulever aujourd'hui mais qu'elle pourra bien ne pas soulever ensuite, est que la jurisdiction des tribunaux ne sera plus respectée.

Les violations répétées conduiront à l'abolition virtuelle des tribunaux inférieurs et à la substitution dans la généralité des cas de la Cour Supérieure à la Cour de Circuit dans des causes qu'elle n'a pas jurisdiction pour en connaître.

Dans l'espèce actuelle d'après l'Acte d'incorporation de la ville de St-Jean, 43-44 Vict., c. 63, sec. 132, la connaissance des actions pour amendes ou pénalités imposées par les règlements de la ville est donnée à la Cour de Circuit du district d'Iberville ou à un juge de paix résidant en la ville de St-Jean. L'intimée est devant le tribunal compétent à l'exclusion de la Cour Supérieure qui se trouve exclue par l'Acte. Comment peut-on même par évocation

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donner à la Cour Supérieure une jurisdiction que la loi lui refuse ? C'est ainsi que s'exprimait l'Hon. Juge en chef dans la cause de *Lambe & Molson*, rapportée M. L. R., 2 Q. B., p. 402.

Dans ce sens *Coursol & Les Syndics de Ste-Cunégonde*, M. L. R., 1 S. C., p. 214.

BOSSÉ, J. (*diss.*) :—

L'action a été portée devant la division non appelable de la Cour de Circuit de St-Jean et réclame une somme de $90, pour infraction pendant les dix jours qui ont précédé l'action d'un règlement passé par la ville de St-Jean.

Ce règlement avait été adopté le 3 décembre 1883, et oblige l'appelante à ériger et maintenir des barrières à divers endroits dans les limites de la ville où les rues sont intersectées par le chemin de la compagnie.

Avant de produire ses défenses la compagnie a produit une demande d'évocation à la Cour Supérieure et au soutien de cette demande elle déclara qu'elle entendait soulever par ses défenses la constitutionnalité du règlement, que cette défense mettrait en question son obligation d'ériger et maintenir à tout jamais des barrières, et à son défaut de ce faire le fait qu'elle serait exposée à perpétuité à une condamnation de dix piastres par jour pour infraction au règlement.

La Cour Supérieure a rejeté la demande en évocation et de là le présent appel.

Il n'est pas mis en doute que la Cour de Circuit, division non appelable, devant laquelle l'action a été portée pouvait prendre connaissance de cette action et avait jurisdiction pour décider sur la demande qui était faite ; C. P. C., 28, 1059.

Mais y avait-il lieu à évocation à la Cour Supérieure ? Limitant pour le moment la question à celle de savoir s'il s'agit ici de droits futurs dans le sens de l'article je trouve que le droit d'évocation, c'est-à-dire de soustraire une cause au tribunal de jurisdiction sommaire et sans appel, qui devrait la juger d'après les règles ordinaires de la procé-

dure, pour la transporter devant un tribunal où la procédure est longue et couteuse, et dont les jugements sont sujets à appel doit être strictement interprété, et ne doit être accordé que dans les seuls cas où les textes concernant l'évocation accordent ce privilège d'une manière formelle.

Or, l'art. 1058, C. P. C., dit : "Dans tous les cas où une "poursuite ou action se rapporte à quelque honoraire, "droit, rente, revenu ou somme d'argent payable à Sa "Majesté, titre à des terres ou héritages, rentes annuelles "ou autre matière qui peuvent affecter des droits futurs : "le défendeur peut avant de faire sa défense au mérite, "évoquer la poursuite ou action, et requérir qu'elle soit "transférée à la Cour Supérieure du district pour y être "entendue et jugée."

Ainsi le droit d'évocation doit être apparent à la face de l'action elle-même.

Le défendeur produit alors sa déclaration d'évocation et sur cette déclaration le dossier est transmis à la Cour Supérieure qui doit, sur le dossier ainsi fait, décider du mérite de l'évocation. Pour en arriver à cette décision la Cour n'a devant elle que la demande telle que formulée, et d'après cette demande seule il doit être décidé si la cause est ou non dans l'une des catégories prévues par l'article.

Le défendeur est tenu de produire sa déclaration d'évocation avant que de produire les défenses au fond, et il ne peut mettre au dossier rien autre chose que cette demande d'évocation. Le texte est formel à cet égard. Il est possible qu'il soit ouvert au reproche de vice de rédaction, mais tel qu'il est il ne me parait pas permettre une procédure autre que celle que je viens d'indiquer.

Partant de là qu'avons-nous dans la présente cause ?

Une simple poursuite pour recouvrement d'une pénalité imposée pour infraction à un règlement obligeant la compagnie défenderesse de faire une barrière et la maintenir, et sur son défaut de ce faire imposant une pénalité de $10 par jour.

Je ne trouve pas dans cette action un des cas qui sous l'article donne lieu à l'évocation.

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Mais, dit la défenderesse, j'ai produit au dossier une intimation de ce que doit être ma défense, et comme telle défense devra nier mon obligation d'entretenir la barrière à l'avenir, cette défense se rapporte à des droits futurs, et j'ai par conséquent le droit d'évoquer.

Ceci ne me parait pas valoir.

Aux termes du dernier paragraphe de l'article, la défense, lorsque produite, peut donner au demandeur le droit d'évoquer, mais ne le donne pas au défendeur, et si la défense elle-même ne donne que ce résultat, l'intimation que telle défense sera produite plus tard ne saurait produire plus d'effet.

D'ailleurs cette déclaration est illégalement produite. Rien dans le texte ne l'autorise, et de plus ce n'est pas dans une déclaration de cette nature que doit se trouver le droit d'évoquer pour le défendeur, c'est dans la demande elle-même, et dans cette demande seule.

L'on dira peut-être qu'une partie pourrait ainsi avoir droit d'évoquer pendant que l'autre partie ne le pourrait pas. C'est possible, mais ce ne serait là encore qu'un vice de rédaction dont nous n'avons pas à nous occuper. Tel que fait l'article doit être appliqué.

L'opinion ci-haut me parait d'ailleurs conforme à l'esprit de toute la législation sur cette matière.

Toutes ces poursuites pour pénalités soit sous le Code Municipal, soit sous l'acte des clauses générales des villes, soit sous l'acte des licenses et d'autres statuts imposant des pénalités du même genre doivent naturellement être de la jurisdiction sommaire des Juges de Paix. En fait elles le sont toutes ou presque toutes. Il est vrai que les statuts ont en même temps déclaré que ces poursuites pourraient également être portés devant la Cour de Circuit, mais c'est par une disposition exorbitante du droit commun que ces poursuites quasi criminelles se trouvent ainsi du ressort de nos cours civiles ordinaires, et il faudrait des raisons bien graves pour faire déclarer que, si la poursuite est portée devant la Cour de Circuit, au lieu de la jurisdiction et décision sommaire du Juge de Paix, elle devra suivre toutes les phases des procédures en Cour

Supérieure, suivies d'un ou peut-être de plusieurs appels successifs.

Si l'appelant avait raison il est à peine une pénalité dans le Code Municipal et les autres actes de police susmentionnés dans laquelle il n'y aurait pas lieu à évocation. Il suffirait au défendeur de dire qu'il avait droit de faire ce qu'il a fait, ou d'omettre de faire ce qu'on lui demande parce que le règlement est nul ou que la loi est inconstitutionnelle, qu'il entend faire la même chose à l'avenir, que partant ses droits futurs sont en question et en danger. De là, suivant la prétention de l'appelant, il résulterait forcément une évocation et un procès en Cour Supérieure.

Tel serait le cas d'une poursuite pour négligence d'entretenir un trottoir ou d'enlever la neige.

Le résultat parait désastreux et bien certainement en dehors des prévisions de ceux qui ont rédigé les lois municipales et de police.

Il est vrai que cette dernière raison n'en est qu'une d'inconvénient, mais elle doit être indiquée pour montrer où pourrait nous conduire l'adoption des moyens de l'appelant.

A tout évènement, elle est suffisante pour m'engager à appliquer strictement le texte de l'article et à renvoyer l'appel dans le cas où il n'y aurait pas un droit clair et absolu à l'évocation.

Pour ces raisons et surtout parce que je ne crois pas la demande d'évocation justifiée par le texte je suis d'opinion de renvoyer l'appel.

DORION, CH. J.:—

The town of St. John's passed a by-law requiring the Grand Trunk Company to erect gates at street crossings, and ordering that for every day the company neglect to put up gates, they should be liable to a penalty of $10. The company not having put up gates, the town of St. John's sued for $90 for nine days, penalties for default. The action was brought in the Circuit Court. The company moved to evoke the case to the Superior Court This

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was rejected by the judgment of the Court below, and the company have appealed from the judgment which refused evocation.

The majority of the Court think there is no difficulty that the action involves future rights: the penalty is $10 per day for all time to come. This clearly affects future rights, and the case comes within Art. 1058 of the Code of Procedure. The judgment will, therefore, be reversed with costs.

The judgment is as follows :—

"La Cour, etc.....

"Considérant qu'il est pourvu par l'article 1058 du Code de Procédure, qu'un défendeur poursuivi en Cour de Circuit à raison de matières affectant des droits futurs peut, avant de faire sa défense au mérite, évoquer la poursuite ou action et requérir qu'elle soit transférée à la Cour Supérieure du district pour y être entendue et jugée;

"Et considérant que la poursuite faite par l'intimée est pour recouvrer des amendes au montant de $90 à raison de $10 par jour, pour avoir négligé pendant 9 jours d'ériger et d'entretenir des barrières aux endroits où le chemin de la compagnie traverse les rues dans les limites de la ville de St-Jean, conformément à un règlement passé à cet effet ;

"Et considérant que l'obligation d'ériger et d'entretenir des barrières dans les rues de la ville à perpétuité, et l'imposition d'une amende de $10 pour chaque jour que la compagnie négligera d'ériger et d'entretenir ces barrières sont des réclamations qui affectent les droits futurs de la compagnie, et qu'aux termes de l'article 1058 du Code de Procédure la compagnie appelante avait le droit d'évoquer cette cause à la Cour Supérieure ;

"Et considérant qu'il y a erreur dans le jugement de la Cour de première instance, savoir, la Cour Supérieure siégeant à St-Jean, dans le district d'Iberville, prononcé le 16 mars 1887, qui a refusé l'évocation demandée par la compagnie appelante ;

"Cette Cour casse et annule le dit jugement du 16 mars 1887, et procédant à rendre le jugement que la dite

Cour de première instance aurait dû rendre, adjuge et déclare qu'il y a lieu à évoquer la présente cause à la Cour Supérieure, et accorde la demande d'évocation faite par la compagnie appelante, et ordonne que le dossier en cette cause sera remis à la Cour Supérieure pour le district d'Iberville pour y être procédé à l'instruction et au jugement de cette cause ainsi que de droit ; et cette Cour condamne l'intimée à payer à la compagnie appelante les dépens encourus sur cet appel ; ceux encourus en Cour de première instance réservés. (*Dissentiente* l'hon. juge Bossé.)"

Judgment reversed.

Paradis & Chassé, attorneys for appellant.

Béique & Turgeon, and *Messier*, attorneys for respondent.

(J. K.)

December 21, 1888.

Coram DORION, C. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

LA COMPAGNIE DU CHEMIN DE FER DE JONCTION DE MONTRÉAL ET CHAMPLAIN,

(*Defendant in Court below*),

APPELLANT ;

AND

SÉVÈRE STE-MARIE,

(*Plaintiff in Court below*),

RESPONDENT.

Pleading—Evidence—Art. 144, *C.C.P.*

To an action to recover the value of a mare killed on the defendants' line, the defendants pleaded specially that the fences on each side of their railway were good and sufficient; that there was no negligence ; and that they had never been put *en demeure* with regard to their fences being out of order. This was followed by a *défense en fait*. In the course of the *enquête* there was evidence which indicated that the locality where the accident occurred was not on the defendants' railway line, but on that of the Grand Trunk Company which controls the defendants' line. On defendants' offering evidence on

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this point, the Court below maintained the objection to the testimony on the ground that there was no contestation raised as to the road on which the accident occurred.

HELD:—That the defendants having pleaded specially, without raising any question as to their ownership of the road, the plaintiff was not obliged to prove the truth of an allegation which had not been specially denied, and which must be taken as admitted.

The appeal was from a judgment of the Superior Court, Montreal (JETTÉ, J.), Sept. 1, 1887, condemning the appellants to pay $150, as the value of a mare killed on their track in the parish of St. Rémi.

The judgment was as follows:—

"La Cour, etc.....

"Attendu que le demandeur, propriétaire d'une terre traversée par la voie ferrée de la compagnie défenderesse en la paroisse de St-Rémi, se pourvoit en dommages contre la dite compagnie à raison de la perte d'une jument de la valeur de $150, lui appartenant, tuée par un engin de la compagnie, le 14 août 1886, sur la dite voie ferrée, où elle avait passée du parc où elle était tenue par suite du mauvais état de la clôture de la compagnie défenderesse, qui malgré de fréquentes mises en demeure, avait négligé d'y faire les réparations nécessaires;

"Attendu que la défenderesse soutient qu'elle n'est pas responsable de l'accident reproché; que ses clôtures étaient bonnes et suffisantes, et que la dite jument du demandeur n'a été tuée que par la faute et négligence du demandeur lui-même qui avait l'habitude de la laisser errer sur la voie ferrée et qui, dans la circonstance l'y a laissée aller; que d'ailleurs cette jument était vicieuse, qu'elle sautait et brisait habituellement les clôtures de la compagnie, et ce, à la connaissance du demandeur qui ne s'en préoccupait pas; enfin que le demandeur n'a jamais averti la compagnie que ses clôtures fussent en mauvais ordre;

"Attendu qu'il est établi en preuve que la clôture de la défenderesse, le long de la terre du demandeur, était en mauvais ordre et tout-à-fait insuffisante pour tenir les animaux avant l'accident, cause de la demande; que la compagnie avait été notifiée dès le mois de juin de ce mauvais état de la clôture, qu'elle avait promis par son

employé à ce préposé de la réparer, mais que cette promesse n'a été ensuite exécutée qu'après l'accident ; que la jument du demandeur est passée du parc où elle était sur le chemin de la défenderesse, par cette clôture en mauvais ordre, et a été blessée par un train de la compagnie, puis achevée par un des employés, vu que sa blessure la rendait impropre à tout service et qu'elle a été trouvée ainsi blessée vis-à-vis de l'endroit où la clôture de la défenderesse était brisée et insuffisante ;

" Attendu que la preuve tentée par la défenderesse pour contredire les faits ci-dessus n'est pas satisfaisante, et n'a nullement détruit le fait capital de l'insuffisance et du mauvais état de la clôture, cause du dommage ;

" Attendu que dans ces circonstances, la défenderesse est responsable de la perte éprouvée par le demandeur ;

" Attendu que la valeur du cheval en question est établie au chiffre de $150 ;

" Renvoie les exception et défense de la défenderesse, et la condamne à payer au demandeur la dite somme de $150, etc."

Nov. 20, 1888.]

G. Macrae, Q. C., for the appellants :—

At the trial and hearing at *enquête* and merits, in the Court below, the Judge presiding refused to allow the appellants to produce and file a plan, which they tendered, shewing the precise locality, where the accident in question is alleged to have occurred, namely, on the line between St. Rémi and St. Isidore stations ; the plan also showing the relative positions at and near St. Isidore Junction, of the line of appellants' railway, " The Montreal and Champlain Junction Railway," and of the line of the Grand Trunk Railway, respectively.

The Judge presiding at *enquête* and merits, in the Court below, also refused to allow the appellants to adduce evidence to indicate and establish the precise locality where the alleged accident actually took place, and to show that the same could not have happened on the line of appellants' railway, but must have occurred on the line

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of the Grand Trunk Railway which runs in a different direction.

The appellants contend, that had they been allowed to produce the plan in question, and to adduce the evidence which they offered, they would have established conclusively, that their line of railway does not extend between St. Isidore Junction and St. Rémi Station, but in a different direction; and that it was the line of the Grand Trunk Railway which extended between these two stations, and the locality where the accident in question had happened; and that the collision, when the animal in question was struck, had occurred with a locomotive engine belonging to, and being driven on the line of the Grand Trunk Railway.

Notwithstanding, however, the objections made on the part of respondent, to the production of the evidence in question, it came out, on the examination of some of the witnesses, and was conclusively proved, that the accident in question actually took place on the line of the Grand Trunk Railway, between St. Rémi Station and St. Isidore Junction, and not on the line of appellants' railway, "The Montreal and Champlain Junction Railway."

The appellants submit, that the respondent has not established by legal evidence, that he is the proprietor of any land adjoining the appellants' railway, "The Mon- and Champlain Junction Railway," nor has he produced any title deed, nor any title whatever, to any property as belonging to him, adjoining the appellants' railway; nor has he established any right of action whatever, on his part, against the company, appellants, in the premises.

Bonin, for the respondent :—

Se voyant condamnée par la preuve faite, la compagnie appelante a cherché finalement à échâpper à une condamnation certaine, en prétendant que la ligne du chemin de fer qui traverse la terre de l'intimé n'appartenait pas à la compagnie appelante, mais à la compagnie du Grand Tronc. La compagnie appelante est sous le contrôle du Grand Tronc, en vertu d'arrangements statutaires. Cette ligne bifurque à St. Isidore, paroisse voisine de St. Rémi.

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L'appelante a cherché à établir par un témoin, que l'embranchement qui passe à St-Rémi, n'appartient pas à la compagnie du chemin de fer de Jonction de Montréal et Champlain, mais bien à celle du Grand Tronc qui contrôle et administre les deux lignes.

La Cour Supérieure n'a prêté aucune attention à cette prétention, et le jugement ne la mentionne pas ; elle a eu raison d'en agir ainsi. En effet, l'appelante, dans ses plaidoyers, a admis formellement, que la ligne du chemin de fer qui traverse la terre de l'intimé, lui appartient ; elle a plaidé que ses clôtures, le long de la terre de l'intimé, étaient en bon état, et qu'elle n'était pas en faute, que le cheval de l'intimé avait été tué pour les raisons déjà mentionnées. Elle ne pouvait donc pas être admise à changer son plaidoyer, pour échapper à une condamnation certaine par la tangente, d'autant plus qu'il n'est pas certain si la ligne qui passe à St-Rémi appartient plutôt au Grand Tronc qu'à la compagnie appelante.

BOSSÉ, J. (*diss.*) :—

L'action est portée pour le recouvrement d'une somme de $150, valeur alléguée d'un cheval appartenant à Ste-Marie, et qu'il allègue avoir été tué par un des convois de la compagnie défenderesse dans le cours du mois d'août 1886, et par la faute de la défenderesse.

L'action allègue spécialement que les clôtures bordant la voie et la séparant de la terre du demandeur étaient à la charge de la compagnie, et que malgré des mises en demeure réitérées de les réparer et mettre en bon ordre la défenderesse avait toujours négligé de le faire et que l'accident était dû à ce mauvais état des clôtures.

A cette action la défenderesse opposa une dénégation générale et un plaidoyer :

" That at the times in the plaintiff's declaration men-
" tioned, and more especially on or about the 14th day of
" August now last past (1886), there were good and suf-
" ficient fences wherever required, on each side of the
" defendants' railway, in the said parish of St-Rémi, and

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" the said fences were kept in good and sufficient order " and repair ;

" That on or about the said 14th day of August (1886), " the said fences were in such good and sufficient order " and condition as to render it impossible for horses or " cattle to pass over or through them, or to enter, from " the adjoining farms or properties, upon the said railway, " unless the said fences were purposely, designedly, or " maliciously broken, removed, taken down or opened ;

" That if any mare belonging to the plaintiff was killed " as pretended by plaintiff, it was owing entirely to the " gross and culpable carelessness and negligence and the " default of the plaintiff himself in allowing his said mare " to stray and wander about and be at large, and in not " taking proper care and precaution to prevent her from " going upon the said railway, where she was at the time " trespassing against the will of the defendants, who used " every proper precaution to keep off horses and cattle " from their said railway ;

" And the said defendants moreover, say :—That the " said plaintiff in allowing (as he actually did) his said " mare to stray and wander about and be at large, acted " contrary to, and in direct violation of the law ; and " that he, thereby, contributed to and caused the alleged " accident to his said mare, which accident would not " have happened if he, plaintiff, had taken due and proper " care and diligence to prevent and keep his said mare " from straying and being at large ;

" And the said defendants further say :—That the mare " in question was a vicious, troublesome and breachy " animal, and in the habit of jumping over and breaking " down the best constructed fences, and this, to the " knowledge of the plaintiff himself, and that the said " mare and the horses of plaintiff were in the habit of " jumping over, removing and breaking down the fence " and fences of defendants, along their line of railway, in " the parish of St-Rémi, notwithstanding all the efforts " of the defendants and of their servants to prevent the " same :—of all which the plaintiff had full knowledge

"and was well aware, but notwithstanding which he "took no means or proper precautions to prevent the "same, but on the contrary allowed his said mare and "horses to continually jump over, remove and break "down the said fences, and to stray and wander about at "large;

"And defendants further say:—That it is not owing "to any fault or neglect of the defendants if the plaintiff "has sustained any such damage as he pretends, but "which the defendants do not admit;

"And the said defendants, moreover say:—That they, "the defendants, were never put *en demeure* by the plain- "tiff with regard to the fences in question being out of "order or insufficient, nor were the said defendants ever "duly notified or called upon by the plaintiff to repair "the said fences or put them in order;

"That by reason of the premises, and by law, no fault "or blame can attach or be imputed to the defendants, "or to their servants for or by reason of the pretended "killing of the said mare, alleged in the plaintiff's de- "claration;

"Wherefore the defendants pray that the plaintiff's "said action and *demande* be hence dismissed with costs."

Jusque-là les parties ont toutes deux paru être sous l'impression que l'accident avait eu lieu sur le chemin de la compagnie défenderesse, et la seule question discutée était celle de savoir s'il y avait eu négligence ou faute de la part de quelqu'un, et qui, du demandeur ou de la défenderesse devait supporter la perte.

Il est cependant bon de noter ici qu'à peu de distance de la paroisse de St-Rémi, où l'accident est arrivé, le chemin de la défenderesse joint celui de la compagnie du Grand-Tronc et que les convois de ces compagnies circulent ensuite sur la même voie.

La cause a été inscrite à l'enquête et mérite, et sur la preuve du demandeur il a été prouvé que le cheval avait été tué sur le chemin de la défenderesse. En fait en présence des prétentions respectives des parties, telles que

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consignées dans l'action et les plaidoyers, il n'était pas nécessaire de faire plus.

Le demandeur prouva de plus qu'à diverses reprises il avait demandé à Suprème Raymond, chef de section, de réparer la clôture de sa terre, que Raymond lui avait promis de la faire réparer et qu'une fois entre autres en réponse à une de ces demandes faites, alors que Raymond faisait une visite officielle du chemin, Raymond lui avait donné de la broche en fer pour attacher provisoirement les perches et piquets ; que deux autres cultivateurs voisins s'étaient adressés au même Raymond pour obtenir aussi des réparations aux clôtures de leur terre.

C'est dans ces circonstances que la preuve de la demande ayant été déclarée close, Suprème Raymond, l'un des premiers témoins de la défense, a été entendu et a déclaré être dans l'emploi non de la compagnie défenderesse, mais de la compagnie du Grand-Tronc, et que Wm. Armstrong, autre témoin, dit être à l'emploi du Grand-Tronc et que c'était lui qui était le chauffeur de la locomotive qui avait tué le cheval, et il procède à raconter de quelle manière l'accident était arrivé.

Cette preuve parait avoir tellement étonné les parties qu'aucune objection n'y a été faite, mais lorsque le lendemain, lors de la reprise de l'instruction la défenderesse qui avait dans l'intervalle de l'ajournement fait préparer un plan des lieux sur les indications fournies par Suprème Raymond, voulut prouver par son ingénieur, M. Ford, qu'en réalité le cheval avait été tué, non sur son chemin, mais sur celui du Grand-Tronc, le demandeur s'y est objecté, a soutenu que cette preuve ne pouvait être admise avec les défenses au dossier ; et son objection a été maintenue par la Cour. La Cour a également et pour la même raison refusé de permettre la production du plan des lieux préparé par l'ingénieur.

Cependant il est assez singulier que sur le témoignage de Leavy, l'ingénieur de la locomotive qui a tué le cheval et qui se donne dans sa déposition comme ingénieur au service du Grand-Tronc, il a décrit la manière dont l'accident est arrivé, et que sur les transquestions posées par

la demande il a déclaré positivement que ce n'est pas sur le chemin de la défenderesse, mais sur le chemin de la compagnie du Grand-Tronc que le cheval a été tué et par une locomotive appartenant au Grand-Tronc.

Ajoutons qu'il est établi que Louis Bonenfant, l'un des conducteurs d'équipe dont il est question au cours de la preuve, n'était pas l'employé de la défenderesse mais l'employé du Grand-Tronc.

Ainsi il est clair que sur des instructions mal données l'action a été dirigée contre la compagnie défenderesse. Que sur des instructions aussi mal fournies la défenderesse a pris pour admis que l'accident avait eu lieu sur son chemin, et que par un malentendu dont le dossier ne nous fournit pas l'explication, les deux parties sont demeurées dans cette erreur commune jusqu'à la déposition d'Armstrong au cours de la preuve de la défense.

Il est également clair que le cheval a été tué, mais l'a été sur le chemin du Grand-Tronc, par une locomotive appartenant à cette compagnie et conduite par ses employés.

La Cour Supérieure, logique avec elle-même, a maintenu au mérite les jugements rendus lors de l'instruction rejetant la preuve offerte par la défense, et elle a maintenu l'action.

Les défenses ne contiennent pas une admission formelle du fait que l'accident a eu lieu sur le chemin de la défenderesse. Elles le donnent peut-être à entendre en invoquant des moyens qui ne sauraient exister que si tel est le cas, mais enfin l'admission ne s'y trouve pas comme admission. Elle vaudrait, s'il s'agissait de l'application de l'article 144 du Code de Procédure Civile, et serait suffisante s'il n'y avait pas de preuve sur ce point, mais c'est là toute la portée que je puisse lui donner.

En fait et en prenant la preuve faite par la défenderesse sans objection de la part de la poursuite, comme aussi la preuve faite sur les transquestions posées par le demandeur, je trouve que le chemin sur lequel l'accident est arrivé est le chemin de fer du Grand-Tronc, que la locomotive qui a tué le cheval est une locomotive

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de cette compagnie conduite par des employés de cette compagnie, que la défenderesse est étrangère à tout cela et n'y a contribué en aucune manière.

Je ne puis fermer les yeux à cet état de choses et en dehors d'une admission claire, formelle, explicite et légale du fait, je ne puis me rendre à dire que la défenderesse doit être condamnée à payer pour ce qu'elle n'a pas fait.

Toutes ces difficultés auraient été évitées s'il avait été lors de l'instruction fait la motion que la défenderesse pouvait faire, mais nous sommes obligés de prendre le dossier tel que les parties l'ont fait, et entre les défenses telles que faites et la preuve, je ne puis hésiter. Le jugement me parait devoir déclarer que l'accident n'a pas eu lieu sur le chemin de la défenderesse, en conséquence que l'appel doit être maintenu et l'action renvoyée, mais le tout sans frais, sauf les frais d'enquête de la demande qui devraient être payés par la compagnie, parce que si elle eut plaidée suivant les faits cette enquête n'aurait jamais été faite.

DORION, Ch. J.:—

The majority of the Court are of opinion to confirm the judgment. The defendants having pleaded in avoidance, and not having denied that the accident occurred on their road, the plaintiff was not obliged to prove that the line passing through his land belonged to the defendants. The Court below excluded the evidence offered by defendants on this point which had not been put in issue by the pleadings. If the *défense en fait* had stood alone, the plaintiff would have been obliged to make proof of the fact that the mare was killed on the defendants' line; but the defendants having pleaded specially, and not having denied this, the plaintiff is not obliged to prove the truth of allegations which are not denied. As the case comes before us, there seems to be some doubt as to the ownership of the road; but for the reason stated we do not think we should disturb the judgment.

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We know that railways have running arrangements, and it is often those who use a road who are liable for damages under such circumstances as those which are disclosed in the present case.

Judgment confirmed, Bossé, J., *diss.*

George Macrae, Q. C., attorney for appellants.

Pagnuelo, Taillon, Bonin & Gouin, attorneys for respondent.

(J. K.)

Nov. 20, 1886.

Coram DORION, CH. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

JOHN CRIDIFORD,

(*Plaintiff in the Court below*),

APPELLANT;

AND

THOMAS C. BULMER,

(*One of the defendants below*),

RESPONDENT.

Action on "bon"—Consideration.

HELD:—Where a *bon*, made to represent the value of a share in a business, purchased by the plaintiff, was endorsed and transferred to the plaintiff by the vendor, that the plaintiff could not sue the vendor on the *bon* while at the same time he retained the share acquired by him in the business, which was represented by the *bon*.

Appeal from a judgment of the Superior Court, Montreal (TORRANCE, J.), Nov. 15, 1884.

TORRANCE, J., (in the Court below):—

The action was against S. J. Brissette, Wm. O'Grady and Thomas C. Bulmer, to recover $4,500, amount of a *bon* dated 15th November, 1882, signed by Brissette & O'Grady

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in favour of Thomas C. Bulmer, and by him endorsed to plaintiff.

Bulmer, by a first plea, set forth that the *bon* was given to him as an acknowledgment that his interest in the business of Brissette & O'Grady was $4,500; that on the 2nd January, 1882, he sold his interest in the business to plaintiff for $1,000 and seven notes of $500 each, and at the same time transferred the *bon* to plaintiff, to show Bulmer's interest in said business. The plea further set forth an action by plaintiff against Bulmer to set aside said sale, and the judgment in the same, of date 29th April, 1884, deciding that Bulmer was not obliged to take back his interest in said business, and the plea averred that it was impossible for plaintiff now to recover the amount of said *bon* while retaining the interest in said business represented by said *bon*. By a second plea, Bulmer set forth that plaintiff retaining his interest in said business had received full value for the amount paid for said *bon*, and could not now claim it, as had been decided by said judgment. A third plea alleged that the *bon* was not a negotiable instrument, and had not been duly presented to Bulmer for payment.

The first and second pleas should be maintained. The *bon* represents the business acquired by plaintiff, and while retaining the business it is impossible for him to claim the amount of the *bon*. The action is therefore dismissed.

The judgment of the Court below was as follows:—

"The Court, etc.....

"Considering that said defendant Bulmer hath failed to prove the allegations of his third plea;

"Doth dismiss the same:

"Considering further that the *bon* declared upon by plaintiff, represents the business acquired by plaintiff from said Bulmer, and it is impossible for plaintiff while retaining such business to claim the amount of said *bon*;

"Considering that defendant Bulmer hath proved the allegations of his first and second pleas;

"Doth maintain the same and dismiss plaintiff's action

as to said defendant Bulmer with costs."

Sept. 16, 1886.]

Dandurand, for the appellant, submitted :—

1st. That there is not *chose jugée* in the present instance.

2nd. That the judgment invoked never declared that respondent held a share or interest in Brissette's business.

3rd. That respondent having no interest in Brissette's business on the 2nd of January, could sell or transfer none to appellant.

4th. That respondent's responsibility could only cease by appellant—creditor of Brissette—becoming the latter's debtor by forming with him a partnership.

5th. That appellant never entered into partnership with Brissette, and, as holder of the note sued for, never ceased to be creditor of Brissette and of respondent jointly and severally.

Busteed, for the respondent :—

If the Court comes to the conclusion that the transaction between appellant and respondent was not a purchase by appellant of the *bon* or acknowledgment in writing sued on in this cause, but on the contrary was the purchase of respondent's interest in said machinery business represented by said *bon* or writing, then there can be no doubt that appellant has received full value and consideration for the money and notes transferred by him to the respondent when he received said *bon*.

It is established that after the sale by respondent to appellant, the latter was continually at the premises and place of business of the said S. J. Brissette, took an active interest therein, assisted in keeping the books of, and managing said business, had a private drawer in the safe, and acted in all respects as a partner.

Also, after purchasing respondent's interest, appellant had the policies of insurance made payable to himself, and on the occurrence of a fire in said premises, on or about the 17th March, 1883, received from the insurance companies the sum of about $1,800, and it was only after the fire that the agreements between appellant and Brissette were entered into.

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It is remarkable that the *bon* or acknowledgment in writing, sued on, was only protested on the 14th May, 1884, or shortly after the rendering of the judgment dismissing appellant's action by which he attempted to make respondent take back his interest in the machinery business.

Respondent submits that the matters *en litige* in this cause are *choses jugées*, and could not be again raised by the present action; that appellant received full value for the consideration paid to respondent when he received said *bon*; that the present action was an after thought of the appellant, and instituted after he had been baffled and defeated in his first action against the respondent.

RAMSAY, J. (for the Court):—

This is an action on a demand note in the following terms:—

NOVEMBER 15, 1882.

Good on demand, to Thos. C. Bulmer, for the sum of four thousand five hundred dollars, with interest at 6 per centum per annum.

(Signed), J. T. BRISSETTE,
WM. O'GRADY.

It was endorsed over by Bulmer, now respondent, to the appellant (when, we don't know), but it was protested on the 14th May, 1884. The value for which this note appears to have been originally given to Bulmer was his share in a partnership with Brissette, terminated by mutual consent on the 15th April, 1882. It seems Brissette required means to carry on the business after Bulmer retired, and then the appellant appears to have been thought of. He discussed the value of the stock and business with Bulmer, and thereupon entered into an agreement (or at least what he subsequently treats as such) with Bulmer. It also appears to be admitted that Cridiford paid the purchase money agreed upon, $4,500,—cash $1,000 and seven *bons* or notes of $500 each, on the 2nd January, 1883. He asked for a receipt in a particular form, and a receipt in precisely that form is produced by defendant. After this payment was made appellant took

stock, 7th January, 1883, and being dissatisfied with the result, he complained to defendant, and he offered amicably to settle the difficulty, if Bulmer would give back one of the *bons* of $500. If not, appellant threatened to denounce respondent to his partners, and to take legal proceedings against him. It seems respondent was not amenable to reason, and appellant executed both his threats. The complaint to Mr. Morton we have before us; of the legal proceedings we only know a little; but that little informs us that the appellant lost his action.

One of respondent's defences is that all the difficulties between him and appellant were then disposed of, and it is *chose jugée* between them. This is not established. The action was not on the note now sued upon. Probably, the other suit turned on the alleged deception to which appellant had been subjected by the statements of respondent, but with that we have nothing to do now. The action is on the note of the 15th November, 1882. The real question is, was it given for value and what was that value? Respondent says it had no value after appellant became the partner of Brissette. Appellant says he never was a partner, and probably he justifies himself by maintaining that he is only endeavoring to recoup himself for what he has lost by the alleged misstatements of respondent.

The view taken by the Court below was that appellant became the partner of Brissette, and that then appellant had full value for the note. We think this view is correct. There can be no doubt that if Cridiford became a partner of Brissette in the place of Bulmer, he had no claim on the note, for we think it is beyond dispute that this note, for which no value was expressed, was given as a settlement of Bulmer's rights in the Brissette concern. Again, we think that he did become a partner, and that this is proved by the very means he and Brissette took to conceal it. Why the lease of Cridiford's services to manage and control the office, to collect and employ others to help him, coupled with a half share in the business, unless he was a partner, and one in a commanding position? Why

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the transfer of the policies of insurance to him? Further, why did he give the $1,000 cash on the 2nd January, 1883, and the seven *bons* to Bulmer, if he had a right to claim from him this $4,500 demand note? The thing is too clear for hesitation. There is another small point of some significance though not essential. Cridiford has, out of the policies and otherwise, got back all his money, save $112.78.

Judgment confirmed.

Joseph & Dandurand, attorneys for appellant.
Busteed & White, attorneys for respondent.
(J. K.)

November 27, 1885.

Coram DORION, CH. J., MONK, RAMSAY, TESSIER, BABY, JJ.

GEORGE C. STEPHEN,

(*Intervenant in Court below*),

APPELLANT;

AND

CHARLES HAGAR,

(*Petitioner and opposant below*),

RESPONDENT.

Judgment obtained in fraud of creditors—Insolvent Act—Sale en bloc—Notice—Prescription—Intervention.

John Stephen, in 1865, became an insolvent under the Insolvent Act of 1864. The principal asset was the share to which he would become entitled on the division of his deceased father's estate, which division was not to take place until the youngest child became of age (in 1881). In the meantime the insolvent's share of the revenues accumulated in the hands of the executors, and was at the disposal of his assignee, but was not claimed by him, and remained in the hands of the executors. John Stephen obtained his discharge, and long afterwards, in 1879, made an offer of ten cents on the dollar for his estate. This offer amounted to about $3,000. At this time there was nearly

double that amount of accrued revenues in the hands of the executors. The offer was accepted by a resolution of creditors at a meeting which was called without specifying the object in the notice thereof, and creditors who were themselves insolvent attended and voted. An order of the Insolvent Court was obtained on the 17th April, 1879, ordering the assignee to carry out the resolution, and the estate was then re-conveyed to John Stephen, who paid the ten cents out of the accumulated revenues, and retained the surplus. He subsequently, in 1881, sold his share of his father's real estate to his brother George C. Stephen, the appellant, for $5,000. On a petition by a creditor to the Insolvent Court to revoke the judgment of 17th April, 1879, as having been obtained fraudulently, the assignee not having disclosed the true position of the estate:

HELD:—1. That the Insolvent Court had jurisdiction to entertain the petition and revoke the judgment of 17th April, 1879, and that an action at law to set aside the sale of the estate was not necessary.

2. That the prescription of one year under Art. 1040, C.C., did not apply, as John Stephen, having obtained his discharge before he purchased the estate, was not a debtor.

3. That the judgment of 17th April, 1879, should be revoked, the resolution of creditors authorizing the sale *en bloc* being illegal, the meeting not having been called in accordance with s. 38 of the Insolvent Act of 1875, and the assignee having concealed the true position of the estate.

4. That the intervention of George C. Stephen was unfounded, his purchase of his brother's share of the real estate not being impugned by the present proceeding.

The appeal was from a judgment of the Insolvent Court, Montreal (TORRANCE, J.), December 20, 1884, setting aside a judgment of the Insolvent Court, of date April 17, 1879.

TORRANCE, J., (in Court below):—

The petitioner sought to set aside a judgment of this Court of date 17th April, 1879, ordering the assignee to carry out a resolution of creditors of date 1st April, 1879. The petition set forth that petitioner was creditor of the insolvent estate of John Stephen to the amount of $1,087.68; that the insolvent made an assignment in 1865 under the Insolvent Act of 1864; that Thomas S. Brown, Esq., was first assignee, and was replaced in 1875 by John Fair, Esq., who acted since; that at a meeting of creditors, on 1st April, 1879, it was agreed to accept the offer of the insolvent for the purchase of the estate at 10 cents in the

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dollar on proved claims unsecured; that the assignee refused to carry out the resolution of 1st April, and the insolvent petitioned the Court for an order upon the assignee to carry out the resolution, and the order was given 17th April, 1879; that on the 19th May, 1879, John Fair acknowledged to have received from the insolvent $2,931.63, being 10 cents in the dollar, and transferred the estate to John Stephen. It then consisted of $5,697.60, then in the hands of William Darling and John Whyte, executors, payable on demand, as the assignee and insolvent knew.

The transfer by the assignee to the insolvent was paid out of the $5,697.60, which was first paid by the executors to the assignee; this sum represented balance of revenue and interest from insolvent's share in his father's estate, the capital being only payable in January, 1881, and more than $10,000, so that John Stephen got what was worth more than $15,000 for $3,137; that said assignee, in answer to the petition of insolvent, did not inform the Court what were the real objections to the petition, but left it to the Court to decide, considering that no property had come into his hands; that said assignee was aware that the meeting of 1st April, 1879, was not called for the purpose of selling the estate *en bloc*, but said assignee did not call the attention of the Court to insufficiency of notice calling said meeting; that the meeting of 1st April, 1879, was not attended by *bonâ fide* creditors of insolvent, except your petitioner, who voted against said resolution; that said insolvent represented to the creditors that the estate had no assets, and that his share would go to his brother and sister if he should die before the youngest became of age, said insolvent further concealing the fact that there was then $5,697.60 in cash in the hands of the executors, obtainable on demand; that it was only within six months that the petitioner knew of the existence of this sum of $5,697.60 and that the assignee had refused to carry out the resolution; that the resolution of 1st April was null. 1. Because a sale *en bloc* could not take place under the Act of 1864. 2. Because

the proper notice had not been given in the *Canada Gazette*; that those voting had no right to vote except himself. Wherefore the petition prayed that the judgment of date 17th April, 1879, be set aside, also the transfer by the assignee to John Stephen, of 19th May, 1879, and all proceedings connected therewith, as fraudulent, illegal, irregular, null and void.

This petition was served upon the insolvent and upon the assignee. The insolvent pleaded a variety of pleas: 1. That the recourse of opposant was not by opposition but by direct action. 2. That John Stephen had been discharged in 1872 (April 30th), and the assignee on the 10th September, 1883, and the Court in insolvency had no longer any jurisdiction. 3. That the assignee being discharged, the creditors were not represented here. 4. That the transfer could not be annulled without the resolution, and there was no demand to annul the resolution. 5. That opposant was not a creditor. 6. That opposant had not opposed the transfer, and had received his part of the dividend without opposition or reserve. 7. That opposant was a *prête nom* of William Darling, who was party to all the proceedings. 8. That more than a year had elapsed between the knowledge obtained by opposant of the will of John Stephen, the father, and the filing of the opposition. 9. General issue. The assignee pleaded in substance to the same effect.

George C. Stephen, the brother of the insolvent, intervened to protect his interests, on the ground that he had acquired on the 25th April, 1881, the rights of John Stephen.

I do not find that jurisdiction is taken away from this Court by the repeal of the Insolvent Act, 1875, by 43 Vic., c. 1. This case began before, and the proviso applies. As to the assignee, he had not been discharged before this petition was presented. As to the insolvent, his discharge does not affect this proceeding, which is merely to get back the estate. As to the creditors, they have nothing to lose and would only gain. and need not therefore be impleaded. As to third parties, the only one affected is

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George C. Stephen, and he has intervened. Again, the Court finds the demand to be regular, and it covers all the proceedings from the 1st April, 1879, inclusive, and of course the resolution of that date. As to the judgment of 17th April, 1879, the Court agrees with the opposant that this judgment is not one to which the authority of *chose jugée* can apply. 30 Demolombe, N. 286; 5 Larombière, C.N. 1351, N. 12. Besides, *chose jugée* is not pleaded. This was a judgment *ex parte* to which opposant was not a party.

Another objection of the parties impleaded is the plea of prescription. The Court agrees with the opposant that Art. 1040, C. C., does not apply. This is not the case of creditors attacking the fraudulent act of a debtor. John Stephen was no longer debtor, and the relation of debtor and creditor did not exist.

Looking, then, at the proceedings preceding the judgment of 17th April, the Court finds the notice for the meeting of 1st April insufficient. It does not say a word as to the sale *en bloc*. This is fatal. Further, the persons present were not *bonâ fide* creditors or their representatives, except opposant who opposed the sale. Next, the transaction itself, selling the estate worth $15,000 more or less for a consideration of $3,137.74, was of a most remarkable and fraudulent character. It is a fact that $3,137.74 were paid by John Stephen to the assignee out of the sum of $5,697.60, which, by means of the order of the assignee, John Stephen received from the executors, Darling and Whyte. As Mr. Barnard, Q. C., counsel for petitioner, strongly puts it: The fraud consists in this, that the creditors were not made aware that the 10 cents which they were taking in payment for the re-conveyance they were making, was actually coming out of their own monies, and was only about one-half of the sum which was practically in the hands of the assignee. They were given to understand that the 10 cents were advanced by the friends of John Stephen, who, taking pity on him, wished to give him a start. John McLachlan did give a cheque for the $3,137.74, as if

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he were advancing the amount out of his own means, but the cheque was never used. The $3,137.74 was paid out of the $5,697.60. In conclusion, the charge against the opposant of knowledge and acquiescence is not made out. The conclusions taken by him are granted.

The judgment of the Court below was as follows:—

"The Court, etc.....

"Considering that the jurisdiction of this Court has not been taken away in this matter by the repeal of the Insolvent Act of 1875, by 43 Vic. cap. 1, (Canada);

"Considering that the demand of the opposant is regular and covers all the proceedings in question from 1st April, 1879, inclusive;

"Considering that the judgment of the 17th day of April, 1879, should not be binding upon opposant;

"Considering that the prescription invoked under the Civil Code Art. 1040, does not apply to the present case;

"Considering that the notice in the *Canada Gazette* calling the meeting of 1st April, 1879, was irregular, and was not for the sale of the estate *en bloc* as required by the section of the Insolvent Act, 1875;

"Considering that the creditors of the insolvent were not represented at said meeting, except by the opposant;

"Considering that the price of the transfer of date the 19th day of May, 1879, namely $3,137.00, was paid out of the moneys of the creditors, namely, $5,697.60, to the knowledge of the assignee and said John Stephen;

"Seeing that there is no proof made of the knowledge or acquiescence of opposant;

"Doth overule and dismiss the pleas of said John Stephen and John Fair, and the intervention of George Chas. Stephen, and grant the conclusions of opposant; in consequence doth set aside the judgment of the 17th day of April, 1879, ordering the said assignee to carry out a certain resolution of the creditors of said estate, as having been obtained fraudulently by the said John Stephen, and by reason of the reticence of the said John Fair; and doth further set aside the said transfer by the said John Fair to the said John Stephen of the 19th May, 1879, and

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all the proceedings connected with the same as fraudulent, illegal, irregular, null and void, and place the parties as they were before the proceedings of the 1st day of April, 1879; reserving to the said petitioner, opposant, his recourse for the recovery of such portion of the said sum of $5,697.60, which was misapplied or paid unduly to parties not entitled to payment, with costs of opposition and contestation thereof by said John Stephen and John Fair, against them severally, and of intervention against the said George Chas. Stephen, which costs are *distraits*, etc."

The insolvent and the assignee did not appeal from the above judgment. The intervenant alone appealed.

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Laflamme, Q.C., and *Lacoste, Q.C.*, for the appellant:—

There is not one word in the evidence to show that the appellant has taken any part in the proceedings complained of or acted in bad faith when, two years after, relying on a notarial deed of transfer ordered by the Court, he bought from the insolvent, discharged long before, his undivided share in real property belonging to their father's estate, for the sum of $5,000 paid in cash. Bad faith is not even alleged against the appellant. He was a minor, living in Bermuda, when the transfer of that property to the insolvent took place. He purchased it from the insolvent to put an end to the inconvenience of indivision, and with the advice of a Queen's counsel, obtained upon a statement of facts made by Wm. Darling himself, the party now instigating this suit.

How could the judgment in the Court below rescind the transfer made to the insolvent by his creditors, give back his property to them by ordering "that the parties be put in the same position as they were before such transfer," when that property had been bought since, upon the authority of a judgment of the Superior Court, by a third party in good faith, and when the revocation of the sale so made to the appellant was not even prayed for?

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The appellant, the most interested party to that deed of sale, was not even impleaded by respondent.

Barnard, Q.C., and *Béique, Q.C.*, for the respondent:—

With regard to third parties, their position is what it would be in an ordinary *action en rescision* for fraud. The deed between the original parties can be rescinded in the absence of third parties, but the judgment cannot be executed against them until they have been impleaded by a subsequent action. In this case the only third party who can be affected is George C. Stephen, and as he has intervened, and it is proved that when he bought he knew all the facts, and therefore was not in good faith, the objection is frivolous.

The second objection of the contesting parties is based on prescription. It is submitted that Article 1040 of the Civil Code does not apply. This is not the case of creditors attacking the fraudulent act of their debtor. The deed attacked is the deed reconveying the estate to John Stephen himself, and as John Stephen was a discharged debtor, the relation of creditor and debtor did not even exist. The only prescription applicable to this case is that of ten years under Art. 2258 C.C.

RAMSAY, J. (*diss.*):—

This is a proceeding in insolvency to set aside a judgment dated 17th April, 1879, ordering the assignee to carry out a resolution of the creditors of the insolvent to re-assign to the insolvent John Stephen, his estate, for the sum of $2,931.63 and the costs of the assignee, amounting in all to a little over $3,000. The petitioner, in substance, alleged that the sale was a fraudulent one, got up to assist the insolvent, and that at the moment it was made, Mr. Wm. Darling had actually in his hands $5,697.60 belonging to the insolvent estate, and that the insolvent had expectations of receiving by succession $10,000—that all this was well known to the parties agreeing to it, and that it was concealed from respondent.

The appellant intervened, alleging that he had bought

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the estate in good faith on the judgment of the Superior Court desiring the assignee to carry out the resolution, and that he cannot be troubled in the matter; that the decision of the Superior Court binds respondent, who was a creditor at the time, and who then had an opportunity to know all about the matter; that there is prescription; and that the action should have been a direct one in the Superior Court and not a proceeding in insolvency. The *dispositive* of the judgment appealed from is as follows:—

"Doth overrule and dismiss the pleas of said John Stephen and John Fair, and the intervention of George Chas. Stephen (the appellant), and grant the conclusions of opposant in consequence; doth set aside the judgment of the 17th April, 1879, ordering the said assignee to carry out a certain resolution of the creditors of said estate, as having been obtained fraudulently by the said John Stephen, and by reason of the reticence of the said John Fair, and doth further set aside the said transfer by the said John Fair to the said John Stephen of the 19th May, 1879, and all the proceedings connected with the same as fraudulent, illegal, irregular, null and void, and place the parties as they were before the proceedings of the first day of April, 1879; reserving to the said petitioner opposant his recourse for the recovery of such portion of the said sum of $5,697.60, which was misapplied or paid unduly to parties not entitled to payment, with costs of opposition and contestation thereof by said John Stephen and John Fair, against them severally, and of intervention against the said George Chs. Stephen."

We are all agreed that the judgment of the 17th April, 1879, was obtained by what is called fraud. It is, perhaps, not one of those frauds that imply any very great moral obliquity. The creditors who were aware of the transaction, were sacrificing their own money out of a kindly feeling to the insolvent, but they had no right to gratify even their good feelings at the expense of others. As far, then, as the insolvent himself and those acting for the estate are concerned, there can be no objection to the judgment and they have not appealed. The appellant

stands on a perfectly different footing, he was not a creditor of the estate, and no one has ventured to say that appellant had anything to do with the fraud. He may have had, but of this we know nothing. We have, therefore, first to examine whether the Superior Court sitting in insolvency had jurisdiction over the movable property conveyed to another by the insolvent, after his estate had been restored to him under an order of court. On this point *Fair & Desilets*, 4 Leg. News, 84, was quoted by respondent. If *Fair & Desilets* has any bearing on this case, it is against respondent. What we held in that case was, that all the property of the insolvent in the possession or custody of the assignee must be dealt with by the insolvent court, so that a person, not a creditor, could not get at the property through the assignee by the usual course of law, the ordinary jurisdiction being taken away. This was an excellent judgment under the statute, but one that worked great hardship in the particular case. We are not likely to forget that decision, because we arrived at it most unwillingly, and only because we could not help it. It is strange it should be misunderstood generally, because the provision in question of the Insolvent Act has more than once been referred to, as an illustration of the legislation necessary to take away the ordinary jurisdiction of the courts of law, in contra-distinction to legislation which only directs another remedy, as, for instance, the statute establishing arbitrations to value expropriations by a municipal corporation. I think, therefore, on this point, that there is no jurisdiction in the insolvent court over the property in the appellant's hands. The judgment appealed from took jurisdiction over it and recognized appellant's right to intervene so far as expressly to limit his rights in a very peculiar manner.

The next thing to be considered is the judgment about to be rendered. I may say generally that the Court is not going to affirm the judgment appealed from. So far as I understand what is to be done, it is this : The Court will not affirm that the judge sitting in insolvency had jurisdiction over the movable estate not in the possession

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and custody of the assignee. It will not say that every old broom once in the hands of the assignee, is to continue for the rest of time with its movable character profoundly modified. Nor will it say that Mr. George Chs. Stephen is to be deprived of his property to give it to Mr. Hagar, who has now in his pocket a dividend paid out of the proceeds of the sale of this property ; but I understand that the judgment will modify the judgment appealed from, only dismissing the appellant's intervention with costs. To this I cannot agree. It is to say, virtually, that appellant had no right to intervene at all, because the judgment did not and could not touch him. On more than one occasion I have had to oppose the allowing of interventions by this Court, where the interest was of so flimsy a nature as to indicate an effort to embarrass the course of justice, but if a third party has ever a right to intervene, surely it must be when the foundation of his title is being attacked. It would neither have been prudent in appellant, nor fair dealing on his part to have sat quiet at the Court House door, leaving suitors to incur great expense to obtain a useless judgment, for no sane person will pretend that respondent had any other object in view than to get paid by the solvent appellant. But if appellant was without right in the Court below, certainly he was not without right in appeal, for he was condemned in the Court below and he has been absolved in appeal.

On the merits, I have no hesitation in saying I think appellant right. On the case before us, that is without evidence of fraud on the part of appellant, it is impossible to go behind the judgment, however bad it might be, to trouble the *bona fide* holder for value. If the property had been stolen, it would not have altered the matter a whit. It is not a question of *res judicata*. Mr. Hagar's pretention is neither more nor less than this, that the solvent appellant shall take respondent's place as the creditor of the insolvent debtor of the latter. Appellant has been fined in costs, respondent has not been otherwise

successful. It seems to me this is neither a satisfactory nor a legal result.

DORION, Ch. J. :—

The facts of this case are somewhat lengthy, but the question is narrowed down in this Court to a mere question of costs—whether the appellant, who did not succeed in the Court below, and who is the only party who complains of the judgment, should have costs. In 1865, John Stephen became insolvent. There were creditors to the amount of about $29,000. T. S. Brown was the first assignee. The insolvent was supposed to have inherited a considerable amount of property from his father, Wm. Stephen, but there was some difficulty as to whether that property would be available to his estate before the youngest child became of age. Mr. Brown, the assignee, obtained opinions from a number of lawyers, and the result was, it appeared that the insolvent's share could not be made available to the creditors until the youngest child became of age, which would not occur until 1881. Brown was suceeeded as assignee by John Fair, and in 1879 the estate still remained unsettled, although it had been fourteen years in the hands of the assignees. The revenues, meanwhile, were accumulating in the hands of William Darling and John Whyte, the executors of the will of William Stephen, father of the insolvent. In 1879, it was ascertained that Darling and Whyte were willing to pay about $6,000 of accrued rents on the share of John Stephen, the insolvent. A friend of John Stephen went round to the creditors, and an arrangement was made that John Stephen, by paying ten cents on the dollar, should get back his estate. The ten cents, it may be observed, amounted to $2,900, and there were then $5,600 in the hands of the executors. A meeting of creditors was called to give effect to this settlement, but the notice did not state that the purpose was to authorize a sale of the estate *en bloc*, as required by a section of the Insolvent Act of 1875 ; it merely stated that the purpose was to instruct the assignee as to the disposal of the estate, and for

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the ordering of the affairs of the estate generally. The meeting was held on the 1st April, 1879. Three of the persons present were bankrupt, and should have been represented by their assignees. The only *bonâ fide* creditor present was Hagar, the respondent. He objected to the sale *en bloc*, but the arrangement was agreed to by the meeting. The assignee consulted counsel, who advised him not to comply with the resolution, until an order was made by the Court. This was applied for, and granted on the 17th April. The ten cents were paid on the 19th May. On that day the $5,697 in the hands of the executors, Darling and Whyte, were paid over by them, and they received a discharge, both from the assignee and the insolvent. The creditors were paid the ten cents out of their own money, and John Stephen retained the balance of the $5,697.

That this was a fraud upon the creditors we are all agreed. Nearly two years afterwards, Hagar, having discovered that there was a fraud, took proceedings to revoke the order of 17th April, 1879. In the meantime, John Stephen, who had one-sixth share in his father's real estate, sold it to George C. Stephen, his youngest brother, the present appellant, for $5,000. George C. Stephen, therefore, had a considerable interest in maintaining the arrangement with the creditors. He was advised to intervene and support the order of the Judge, and the transfer of the estate by the assignee to John Stephen. But the title of George C. Stephen is not questioned by the petition. The judgment of the Court below, which we maintain, declares the proceedings fraudulent, and sets them aside; but it does not touch George C. Stephen's title to the real estate purchased from his brother. There is no evidence that he knew anything of the transactions connected with the transfer of the estate by the assignee. Why has he attempted to support them? He fails upon the appeal, and must pay the costs. The appeal is dismissed, but we shall modify the terms of the judgment so as to make it clear that we decide nothing as to the title of the appellant.

MONK, J. :—

I concur in the judgment as rendered by the Chief Justice, and I may add that I would carefully abstain from expressing any opinion upon the transaction between the two brothers. The other transactions—those relating to the transfer of the estate—are entirely indefensible and fraudulent; but I have formed no opinion, and I express none, upon the legality or good faith of the transaction between the two brothers.

The judgment in appeal is as follows :—

" The Court, etc.....

" Considering that the jurisdiction of the Court below has not been taken away in this matter by the repeal of the Insolvent Act, 1875, by 48 Vic. cap. 1 (Canada);

" Considering that the demand of the opposant, now respondent, is regular, and covers all the proceedings in question from 1st April, 1879, inclusive;

" Considering that the judgment of the 17th day of April, 1879, should not be binding upon opposant, now respondent;

" Considering that the prescription invoked under the Civil Code, Art. 1040, does not apply to the present case;

" Considering that the notice in the *Canada Gazette*, calling the meeting of 1st April, 1879, was irregular, and was not for the sale of the estate *en bloc*, as required by the section of the Insolvent Act, 1875;

" Considering that the creditors of the insolvent, John Stephen, were not represented at said meeting, except by the opposant, now respondent;

" Considering that the price of the transfer of date the 19th day of May, 1879, namely, $3,137, was paid out of the monies of the creditors, namely, $5,697.60, to the knowledge of the assignee and said George Stephen;

" Seeing that there is no proof made of the knowledge or acquiescence of opposant, now respondent;

" And considering that there is no demand on the part of the respondent Hagar, to set aside the deed of sale of the 25th April, 1881, by John Stephen to the said George Charles Stephen, and that the rights of the said George

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Charles Stephen under said deed can only be determined when the said deed of sale is impugned, and the said George Charles Stephen is disturbed in the possession of the property sold to him under the said deed of sale;

"The Court, adjudicating on the intervention of the said appellant, George Charles Stephen, and on his contestation of the opposition of the said respondent, doth dismiss the said intervention and contestation of the appellant, and also his present appeal, with costs, as well in the Court below as in this Court; reserving, however, to the said George Charles Stephen all rights which he may have under the said deed of sale of the 25th April, 1881, without adjudicating as to the validity and effect of said deed. (The Hon. Mr. Justice Ramsay dissenting)."

Judgment confirmed.

Laflamme, Huntington, Laflamme & Richard, attorneys for appellant.

Barnard & Barnard, attorneys for respondent.

(J. K.)

September 20, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, CHURCH, JJ.

MICHAEL P. RYAN,
(*Defendant in Court below*),
APPELLANT;

AND

DAME MARY C. SANCHE ET VIR,
(*Plaintiffs in Court below*),
RESPONDENTS.

Customs law—Revendication, by importer, of goods retained as forfeited by collector of customs—Order for delivery to plaintiff—Security.

HELD:—Where goods were retained by the collector of customs as forfeited under the Customs Act, 1883, and the importer seized them in the collector's hands by process of revendication, that the plain-

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tiff was entitled to an order for the delivery thereof only on making deposit with the collector of a sum of money at least equal to the full value of the goods.

Quære, whether, pending a controversy between the importer and the Customs Department, an action of revendication will lie to revendicate goods retained by the collector as forfeited.

Semble (*per* CHURCH, J.), that it is not competent for an importer to adopt this proceeding under the circumstances.

The appeal was from an interlocutory judgment of the Superior Court, Montreal (MATHIEU, J.), January 28, 1887, ordering that the respondents (plaintiffs), J. Z. Désormeau & Co., be put in possession of certain skins seized in the cause, upon furnishing personal security.

The judgment appealed from was in these terms :—

" La Cour après avoir entendu la demanderesse par ses avocats sur sa requête produite ce jour, demandant qu'elle soit mise en possession des peaux saisies-revendiquées en cette cause, afin de les manufacturer avant la fin de l'hiver, en par elle donnant caution, le défendeur ayant fait défaut de comparaître à l'audition, quoique dûment appelé ; examiné la procédure et délibéré ;

" Accorde la dite requête et ordonne que la demanderesse soit mise en possession de quatre cents peaux saisies-revendiquées, en par elle fournissant les cautions offertes, savoir, MM. P. P. Martin, marchand, et J.-Bte. Renaud, fils, teneur de livres, tous deux de Montréal, qui garantiront que la demanderesse représentera la valeur des dites peaux, quand elle en sera requise ; dépens réservés."

By the reasons of appeal the appellant submitted :—

The goods in question were duly seized by the appellant in his capacity of collector of customs, at the port of Montreal, as forfeited under the Customs Act, 1883, and the laws relating to the Customs. It is provided by the Customs Act, 1883, and the laws relating to the Customs (R. S. ch. 32, s. 187), in effect, that the Court or judge can only order the delivery of goods so seized to the owner, with the consent of the collector at the place where the things seized are, and upon deposit with the collector in money of a sum at least equal to full duty paid value (to be determined by the collector) of the things seized, and

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the estimated costs of the proceedings. Personal security was insufficient.

CHURCH, J. (for the majority of the Court) :—

This is an appeal from an interlocutory judgment rendered on the 28th January last by the Hon. Mr. Justice Mathieu, on the petition of the respondents, whereby leave was granted them to be put in possession of 400 skins seized by them by process of revendication, upon their giving the usual security. Application was made by the appellant to appeal from this interlocutory judgment; permission was granted, and the parties heard.

The plaintiff in the Court below alleges in her action that she imported into this country 400 deer skins, and made entry of them as such. The Customs authorities seized them as being sheep skins, and claimed that as such they were subject to a duty of 20 per cent., instead of 10 per cent., which would be the duty had they been deer skins. An appeal was taken from the decision of the defendant to the Minister of Customs, who decided that the plaintiffs might amend their entry, on paying 10 per cent. additional over and above the 10 per cent. which they had paid, and a minimum fine of fifty dollars, but that failing so to do, the goods should be declared forfeited to the Crown. This the plaintiffs (respondents) were unwilling to do, and after the usual notice to the seizing officer of one month, issued the seizure (*saisie revendication*) now the subject of enquiry.

The questions to be decided are, was it competent for the respondents to issue a *demande en revendication* addressed to the defendant under the circumstances stated, and could they accompany it by a *saisie*, and could they obtain an order for delivery to them such as was rendered in this cause ?

It will be observed that there is no difficulty or discussion between the parties as to the facts.

The goods were goods being imported into the country. They had not yet been surrendered over to the importer. They were in the Customs warehouse, and under the

operation and control of the Customs Act, 46 Vic. cap. 12, and were the subject of controversy between the importers (respondents) and the Department of Customs represented by the appellant; and the controversy was based on the 48th section of that Act, which is sometimes spoken of as the "Non-correspondence clause."

The clause reads as follows :—

48. "No entry, nor any warrant for the landing of any goods, or for the taking of any goods out of any warehouse (as hereinafter provided) shall be deemed valid, unless the particulars of the goods and packages in such entry or warrant correspond with the particulars of the goods and packages purporting to be the same in the report of the vessel, or other report (where any is required) by which the importation or entry thereof is authorized, nor unless the goods have been properly described in such entry by the denominations, and with the characters and circumstances according to which such goods are charged with duty or may be imported; and any goods taken or delivered out of any vessel, or out of any warehouse, or conveyed into Canada beyond the port or place of entry, by virtue of any entry or warrant not corresponding with the facts in all such respects, or not properly describing the goods, shall be deemed to be goods landed or taken without due entry thereof, and shall be seized and forfeited; and the collector or proper officer, after the entry of any goods, may, on suspicion of fraud, open and examine any package of such goods, in presence of two or more credible witnesses, and if, upon examination, the same are found to agree with the entries, they shall be re-packed by such collector or proper officer, at the public cost, but otherwise they shall be seized and forfeited."

If these goods were not deer skins, but sheep skins, the attempted entry of them as deer skins was no entry at all, and they were liable to forfeiture.

I assume from the statements of the respondents that an appeal was taken under the provisions of sect. 99 of the Act, to the collector, and under the other provisions of the Act, ultimately to the Minister (sects.

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218, 219, 220, 221), by whom it was decided that the duty was as I have before stated, and that the respondent (importer) should pay the 20 per cent. demanded, and a minimum penalty of $50.

To avoid the consequences of the provisions of sect. 221 the present suit was instituted, and as I have said, the first question to be decided is, was such a suit open to the respondent ?

I think not. The goods were in the hands of the Customs authorities for the purpose of being admitted into the country ; they were there under the grasp of the Customs law. That law derogates from the ordinary right of proprietors to have the corporal possession of their property, and withholds it from them till they have complied with its provisions.

This law (the Customs law) further derogates from the civil law (sec. 224) in so far as it provides a means of trial and a tribunal distinct from and different to that provided in other cases, and by the ordinary tribunals ; and it goes further, and provides that over such goods as have been made the subject of such trial and investigation and decision, the Minister of Customs shall have authority, if his decision is not acquiesced in, and the money which he has ordered to be paid is not paid, he, the Minister, may not alone forfeit the goods, but sell them, and dispose of the proceeds in the manner provided by the Act.

If it were competent for an importer to adopt the measures which have been adopted in this case, all the provisions of the Act above quoted would be impracticable and illusory, and the intentions of the Legislature in enacting as it has done would be set at naught ; and especially would the canon of interpretation laid down in the concluding lines of the 4th section of the Act, which is as follows, receive no meaning from the courts :—" All " the terms and provisions of this Act, or of any such law " as aforesaid, shall receive such fair and liberal construc- " tion and interpretation as will best ensure the protec- " tion of the revenue and the attainment of the purpose

"for which this Act or such law was made, according to "its true intent, meaning and spirit."

As respects the right of the Court below to make the order to permit security to be given, it seems to me that the general scope and provisions of the Act show, and especially the provisions of sect. 204 show that when the question of whether goods are or are not forfeited to the Crown, and when the question of permitting or not permitting the owner to give security for their re-delivery to him can be brought under the notice of the Court, the Court having jurisdiction to try the case may order the delivery to the owner, but only when the owner has deposited such a sum of money *with him as he* (the collector) shall determine is the full value (duty paid) of the goods in question.

This was not done in this case, and the judge, in ordering as he did, exceeded his powers and did not conform to the provisions of the Customs Act.

I am of opinion the judgment permitting security to be given should be vacated, annulled and set aside with costs against the respondent.

I would like to add that if it had been shown that the Customs authorities had no jurisdiction over the property, or were acting colorably under the law, but in violation of its true spirit and intent, then I doubt not an owner might protect his rights through the Civil Courts; but I don't understand that the jurisdiction of the officers is denied, but simply their discretion or judgment impeached. And I don't think this can be tried in that way. She had her recourse otherwise, and should have availed herself of it either under the Act or by representation to the Executive.

The judgment is as follows:—

"The Court, etc.....

"Considering that the judgment appealed from, to wit, the interlocutory judgment rendered by the Superior Court, at Montreal, on the 28th of January, 1887, orders the delivery to the female plaintiff, now respondent, upon her giving personal security to refund the value thereof when

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required so to do, of the four hundred skins seized by process of revendication at the suit of the said plaintiff in the hands of the collector of customs, the present appellant (defendant below), who retained them as forfeited under the Customs Act, 1883, and that under the law, and the provisions of the said Act, such an order could be given only on the deposit with the collector of customs, in money, of a sum at least equal to the full value of the said four hundred skins;

"Considering, therefore, that in the said interlocutory judgment of the 28th January, 1887, there is error;

"The Court of our Lady the Queen now here doth reverse and annul the same; and proceeding to render the judgment which the said Court below ought to have rendered, doth dismiss with costs the petition of the plaintiff now respondent, praying for the delivery of the said goods, and doth condemn the respondent to pay to the appellant the costs incurred by him in this Court. (The Hon. Mr. Justice Tessier dissenting)."

Judgment reversed.

Abbotts & Campbell, attorneys for appellant.

Laflamme, Laflamme, Madore & Cross, attorneys for respondent.

(J. K.)

May 27, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

PIERRE E. NORMANDEAU,
(*Defendant in Court below*),
APPELLANT;

AND

CHARLES A. McDONNELL ès qual.,
(*Plaintiff in Court below*),
RESPONDENT.

Testamentary executor—Right to possession of moveables of the succession—Art. 918, *C. C.*

HELD:—That the father of minors, legatees under a will, cannot exclude the testamentary executor from the possession of the moveable property of the succession, even for the use of the minors.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), May 31, 1884.

The respondent, as executor of the late Madame Normandeau, wife of appellant, issued a *saisie revendication*, claiming possession of a piano, sewing machine and other moveables belonging to the deceased.

The defence was that the will had been made under the influence of fraudulent representations and improper suggestions by respondent and the relations of deceased, at a time when she was incapable of making a valid will; that the defendant (appellant) had been appointed tutor to his minor children and was in possession of the effects in his quality of tutor.

The Court below held that plaintiff's title as executor was sufficient to maintain his claim to the moveables of the succession of Madame Normandeau, and that defendant's claim as tutor should not conflict with or overrule the same.

The judgment of the Court below was in the following terms:—

"The Court, etc.....

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"Considering that defendant hath failed to prove that the appointment of plaintiff as executor was unduly suggested or influenced;

"Considering that the title of plaintiff is sufficient to maintain his claim for the moveables of the succession of the deceased Mrs. Normandeau, and that the claim of defendant as tutor, should not conflict with or overrule the same;

"Considering that plaintiff hath established his title as executor of said will to the following articles, to wit: (*articles enumerated*);

"Doth overrule defendant's plea and adjudge plaintiff in his said capacity to be the owner of said moveable effects of the aggregate value of $190.30, doth declare the seizure thereof valid, doth condemn defendant to deliver up the same to plaintiff within eight days after the service upon him, defendant, of this judgment, and in default of defendant so doing within said delay, he is hereby condemned to pay to said plaintiff *ès-qualité* the said sum of $190.30, the whole with costs, *distraits*, etc."

May 18, 1886.]

Pagnuelo, Q. C., for the appellant:—

1ère Question. — Quels sont les pouvoirs de l'exécuteur testamentaire à l'encontre de l'héritier quant à la possession du mobilier? Dans les circonstances de l'espèce, l'exécuteur pouvait-il enlever au tuteur des héritiers mineurs, la possession du mobilier, des lits, etc.?

Il semble au premier abord qu'il y ait contradiction entre la disposition de la loi qui donne à l'héritier la saisine et la possession des biens du défunt, *qui saisit le vif au décès* de la personne représentée, et celle qui donne à l'exécuteur testamentaire la possession des biens du défunt, même à l'encontre de l'héritier; entre les pouvoirs du tuteur de gérer et administrer les biens et la personne du mineur, avec obligation de faire inventaire, et les pouvoirs de l'exécuteur testamentaire d'exécuter le testament et de faire inventaire.

Mais ces contradictions sont plus apparentes que réelles. Il est facile de les concilier en examinant les droits de

l'héritier qui est propriétaire comme successeur de la personne du défunt, et ceux de l'exécuteur testamentaire qui n'est qu'administrateur provisoire dans l'intérêt de l'héritier et des créanciers et pour une fin spéciale ; la possession de l'exécuteur testamentaire doit naturellement être restreinte à la fin spéciale pour laquelle il agit, et toute tentative d'aller au-delà est sans intérêt réel, contraire à l'intérêt de l'héritier, et partant contraire à la loi.

A l'encontre de la maxime que *le mort saisit le vif*, que l'héritier représente la personne du défunt et succède à tous ses droits de propriété (891, C. C.), que le tuteur gère les biens et la personne de son pupille du jour de sa nomination, (265, 290, C. C.), qu'il demande la levée des scellés et fait inventaire (292, C. C.), paie les dettes (292, 294, 917—9 Quebec Law Rep. 145, *Seed* v. *Tait*) ;—on oppose l'article 918 du Code Civil qui est dans les termes suivants : " L'exécuteur testamentaire est saisi, *comme dépositaire légal, pour les fins de l'exécution du testament*, des biens meubles de la succession, et peut en revendiquer la possession même contre l'héritier ou le légataire."

La saisine de l'exécuteur testamentaire, *comme dépositaire légal et pour les fins de l'exécution du testament* est bien différente de celle de l'héritier, et du tuteur pour l'héritier mineur, qui possède à titre de propriétaire.

1. Ricard, *donations*, part. 2, Nos. 71 et suiv.
2. Bourjon, part. 5, ch. II, sect. 2 et 3, Nos. 14, 17, 18.
1. Ricard, *Don.* part. 2, No. 79.
8. Pothier (Bugnet), *Don. test.* Nos. 218 et suiv.

Voilà pourquoi l'article 919 de notre C. C. dit que l'exécuteur testamentaire est tenu de faire inventaire en y appelant les héritiers, légataires et autres intéressés : il peut, avant l'inventaire, faire tous actes conservatoires et autres qui demandent célérité, mais, comme le disent les auteurs cités plus haut, il ne peut se mettre en possession du mobilier, qu'après avoir fait inventaire ; c'est ce qui ressort de cet article 919 :

Il paie les dettes, du consentement de l'héritier, sinon avec l'autorisation du tribunal ; l'art. 919 ajoute : " En cas d'insuffisance de deniers pour l'exécution du testament, il

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peut, *avec le même consentement ou la même autorisation*, faire vendre jusqu'à concurrence le mobilier de la succession. *L'héritier ou le légataire peuvent cependant empêcher cette vente en offrant de remettre les sommes nécessaires pour accomplir le testament.*"

Il résulte clairement de ces différentes dispositions, 1o. que l'exécuteur testamentaire, *comme dépositaire légal* ne peut prendre possession du mobilier, qu'après avoir fait inventaire; 2o. qu'il ne vend le mobilier que pour payer les dettes; 3o. qu'il ne peut vendre que du consentement de l'héritier ou avec l'autorisation de la Cour; 4o. que l'héritier peut empêcher cette vente en offrant les deniers nécessaires pour payer les dettes; 5o. que toute tentative de l'exécuteur de priver l'héritier de la possession du mobilier qui lui appartient en pleine propriété, si ce n'est pour payer les dettes, après inventaire, est sans objet, une taquinerie vexatoire réprouvée par la loi.

Or, 1o. l'intimé n'a pas fait inventaire, ni cherché à le faire; l'appelant a lui-même commencé à en faire un, que l'intimé, sa mère et ses sœurs ont empêché en refusant d'ouvrir la porte au notaire; l'intimé a même répondu par écrit à l'appelant qu'il s'y opposait; 2o. il n'y a aucune dette à payer, l'intimé n'en allègue aucune; bien plus, il a eu des sommes d'argent appartenant à la défunte, tous ses bijoux, habits, plusieurs articles de ménage, et il veut encore enlever aux enfants les autres articles du ménage, jusqu'aux lits, à la vaisselle, aux couteaux et fourchettes— n'est-ce pas de la pure méchanceté?

En droit, la demande, telle que formulée, est insoutenable, parce que l'intimé n'allègue ni un droit absolu, qui n'existe pas, ni les conditions nécessaires pour parvenir à la vente du mobilier pour laquelle il n'allègue aucune nécessité.

L'exécuteur testamentaire n'a pas le droit à la jouissance, au domaine utile des meubles pour lui-même; c'est à l'héritier que ce domaine utile appartient; il ne peut demander la possession des meubles que pour les vendre, s'il y a nécessité; il n'en allègue pas, et il n'en existe pas; la demande devait donc être refusée.

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Branchaud, for the respondent.

RAMSAY, J.:—

This is an action in revendication by the testamentary executor, against the surviving husband of the testator, of the movables, *meubles meublants*, in what was the common domicile of the deceased and where the children of deceased, her heirs under the will, live.

To this action appellant pleads: first, that the will was obtained by undue influence, when the testator was in a state of mind which incapacitated her from making a will; secondly, that appellant is tutor of his minor children, sole universal legatees under the will; that he has to make an inventory; that he holds the moveables of the testator for the use of his children; that part of the moveables seized are his; thirdly, that the executor has a right and ought to make an inventory, but he has no right to remove the things from the use of the children to whom they belong.

Nothing has been advanced in support of the first ground of defence.

The father, as tutor of his children, sued in his own name, can validly raise the issue that he is in possession of these things for his children, and that they are used by them. But the question is as to its value when pleaded. Article 918, C. C., seems to me to cut short all speculative discussion on the point. The executor is seized as *legal depositary* of the movable property of the succession, and may claim *possession* of it even against the heir or legatee. At the argument it was contended that this *saisine* was merely for certain purposes, and that it conveyed only a species of limited or legal possession, and that the detention or manual possession resided, where was not said, but we were asked to say, that if by accident it was in the hands of the legatee, he could keep it. Such a doctrine would be a violation of any permissible interpretation of the Code, for it says precisely the reverse. There may be some difference from the old law, but the codifying commissioners have not remarked it, and where the

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law is expressly stated, and in language which is neither incomprehensible, contradictory nor ambiguous, it would be a waste of time to examine here into any difference there may be. The modern French law is very different from ours.

In arriving at this conclusion, respondent is treated as an ordinary executor. He has powers of administration under the will, which are not pleaded.

On the question as to the ownership of the things, the defendant's answers form all the evidence, except as to the piano and the sewing machine. The marriage contract gives her all the plated and silver ware. He also gives his movables mentioned in a schedule, and there is no schedule. The judgment will be modified as to certain articles.

The judgment in appeal is as follows :—

"The Court, etc.....

"Considering that there is no error in the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal, on the 31st of May, 1884, except as to the following articles of household furniture, to wit (*articles enumerated*), which have been proved to be the personal property of the appellant, the seizure whereof is therefore hereby annulled and set aside, and appellant given *main levée* thereof, and doth affirm the said judgment in all other respects, with costs to the respondent against the appellant."

Judgment confirmed.

Joseph & Dandurand, attorneys for appellant.

Judah, Branchaud & Bauset, attorneys for respondent.

(J. K.)

[CROWN SIDE.]

November 14, 1888.

Coram CHURCH, J.

SMITH v. THE QUEEN.

2 *R. S., ch.* 157, *s.* 8—*Vagrant—Licensed carter soliciting fares near door of hotel.*

HELD:—That a licensed carter who, contrary to a city ordinance, loitered near the entrance to a hotel in the city of Montreal, and solicited passengers for conveyance in his cab, is not a loose, idle, or disorderly person, or a vagrant, within the meaning of 2 R. S., ch. 157, s. 8,—more especially where it is not proved that such loitering obstructed passers-by, or incommoded guests in the hotel.

The case came up on an appeal from a decision of the Recorder's Court.

CHURCH, J.:—

The original prosecution in this matter was under chapter 157 of the Revised Statutes of Canada, which is intituled: An Act respecting offences against public morals and public convenience. The particular clause invoked by the prosecution was sub-section (*e*) of sect. 8, which enacts that all persons "loitering on any street or "highway, and obstructing passengers by standing across "the footpaths, or by using insulting language, or in "any other way, are loose, idle or disorderly persons or "vagrants, within the meaning of this section." The complaint was in the following terms: That on the 23rd day of July, 1888, the defendant "a rôdé dans la rue "Notre-Dame et gêné les passants en se tenant en travers "du trottoir de la dite rue et y sollicitant illégalement la "clientèle des voyageurs, contrairement à la forme du "statut en pareil cas fait et pourvu." The Recorder condemned the defendant to a fine of twenty cents and costs, and to be imprisoned, in default of payment, until such time as both were paid.

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It is from that condemnation the present appeal is taken.

On the part of the prosecution my attention has been drawn to By-law No. 50 of the corporation of this city, which requires amongst other things, by sect. 33, that all drivers of public vehicles shall be personally licensed; by sect. 40, that no carter shall when unemployed loiter about or remain in any other place than on one of the cab stands. Sect. 47 forbids drivers of vehicles from absenting themselves from the vehicles under their charge. Sect. 53 makes master carters, employers and owners of horses and vehicles, liable for the misconduct of their servants, drivers or persons in their employ. And it is argued that it being proven that the appellant, on the day in question, having been seen by the witness Pominville to solicit some 18 or 20 persons, during the course of the day, to make use of a cab which he would supply, and that such solicitation took place whilst standing upon the sidewalk in front of the Balmoral Hotel, and that two at least of the persons so solicited were persons passing along the street, and that the others were guests of the hotel (whom he so solicited), as they came out of the door of the said hotel and upon the street, and it being admitted that the appellant was a licensed carter of the city, but that his cab was then in charge of another person, a driver in his employ: it is argued, I say, that the appellant, in leaving his cab in charge of another, in taking up his position on the sidewalk, and in soliciting from guests issuing from the hotel and persons passing along, employment for his cab, was committing an illegal act, and infringing the city ordinance, that such illegal conduct in leaving his cab and soliciting employment as described, was also an infraction of the sub-sect. (*e*) of sect. 8 of cap. 157, and was a loitering and obstruction of the street, and that the appellant became thereby a vagrant within the meaning of that Act, and that the conviction was good.

On the part of the appellant it is contended that it was competent for the appellant to act as he did; that at most,

his conduct was only an infraction of the said city ordinance or by-law, and punishable as that ordinance provided, and that as he was following a legitimate calling, and one which he was licensed to follow, and that inasmuch as it was not shewn affirmatively that the public was inconvenienced by his conduct, or the street obstructed, that he could not be considered as a vagrant within the meaning of the Act.

In reply it was contended that if it were permitted to one carter to act as the appellant had done, the whole of the carters might assemble around the door of any hotel, and that thereby the street might become obstructed, passers by inconvenienced to an extreme degree, and ingress and egress to the hotel blocked, and that what applies to an hotel would equally apply to any other building in the city.

It appears to me that if the prosecution is to be confined to the statute—and it clearly must be, for the information invokes the statute and the statute alone—the facts shewn do not sustain the conviction; for although it is shewn that he loitered in the street, it is not shewn that such loitering obstructed passers by or incommoded guests in the hotel. Had such been shewn, I might have been disposed to take a different view; but on the case laid and made, I only find this, that this man (the appellant) was in the pursuit of a lawful calling. I do not find any evidence that any one was in the least inconvenienced by his conduct, or that the street or sidewalk was in any sense or to any extent whatever obstructed. It has not even been shewn that any one complained of his conduct, beyond the complaint made by Mr. Supple, who had leased the exclusive privilege of standing within the precincts of the hotel, and there soliciting employment for his cabs from the guests and visitors at the hotel, and Messrs. Hamilton & Ligget's complaint in the same sense as lessors of that privilege to Mr. Supple; but such complaint is not of any infraction of public morals or public convenience except in so far as it affects them pecuniarily. I therefore cannot see in the conduct of the appellant, on

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the occasion complained of, an act of vagrancy within the meaning of the law, and I think the conviction should be set aside—and it will be set aside accordingly, and the appeal maintained with costs.

Conviction quashed.

John S. Hall, Q. C., for the appellant.
Ethier, for the Crown.
(J. K.)

November 28, 1882.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

THE ST. ANN'S MUTUAL BUILDING SOCIETY,

(*Plffs. and hypothecary creditors contesting opposition in Court below*),

APPELLANTS;

AND

CHARLES S. WATSON ET AL.

(*Opposants and creditors collocated in Court below*),

RESPONDENTS.

Community—Gift of immovable property made to consorts jointly by ascendant of one of the consorts—Effect of—Art. 1276, *C.C.—Opposition—Distribution of money.*

HELD:—1. That the gift of immovable property by a father to his daughter and her husband jointly, is deemed to be a gift to the daughter alone (C.C., Art. 1276); and so where a judgment against the son-in-law is registered against property so given, there is no hypothec, the title not being in the son-in-law.

2. When money is before the Court for distribution, the real question is as to the party entitled to it—and not the regularity of the proceedings by which it was procured.

3. An unpaid creditor can raise the question as to the real owner of the property sold in execution, and can claim the proceeds, although the real owner be silent.

The appeal was from a judgment of the Superior Court,

Montreal (PAPINEAU, J.), June 30, 1881, dismissing the contestation by appellants of the collocation in favor of the respondents.

The judgment of the Court below was in the following terms:—

" La Cour, après avoir entendu la demanderesse-contestante et les opposants colloqués, Charles S. Watson *et al.*, par leurs avocats, sur le mérite de l'opposition et collocation des dits Watson *et al.*, et de la contestation d'icelles par la demanderesse, etc....

" Considérant qu'il est allégué par la demanderesse dans sa contestation et qu'il est prouvé que l'immeuble vendu en cette cause n'appartenait pas au défendeur, mais à sa femme, Mary Mulhall, en vertu du testament de feu son père, John Mulhall, et de l'article 1276 du Code Civil ;

" Considérant que l'obligation du 16 juillet 1875, consentie par le défendeur en faveur de la demanderesse, avec l'assentiment par écrit de la dite Mary Mulhall, hypothéquant l'immeuble en cette cause, ne peut valoir contre cet immeuble que jusqu'à concurrence de la somme employée à payer la balance de l'obligation hypothécaire consentie par feu John Mulhall, le 21 de juillet 1870, en faveur de 'The Provincial Permanent Building Society,' et dont Mary Mulhall était tenue comme légataire de son dit père ;

" Considérant qu'il est établi par la quittance du 19 juillet 1875, de la dite 'The Provincial Permanent Building Society,' J. S. Hunter, N. P., que la balance due en vertu de la dite obligation, n'excède pas $992.00 ;

" Considérant que la demanderesse est déjà colloquée par le projet d'ordre pour un montant excédant la dite dernière somme, savoir, pour $995.15 et qu'elle n'a pas droit de demander plus, et qu'elle est, par conséquent, sans intérêt pour réclamer plus sur le produit de la vente de l'immeuble de la dite Mary Mulhall ;

" La Cour renvoie la contestation de la demanderesse avec dépens, distraits, etc."

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Sept. 25, 1882.]

J. O. Joseph, for the appellants :—

In their opposition *afin de conserver*, the respondents alleged : That on the 10th April, 1874, judgment was rendered in a cause No. 1931, in which the opposants were plaintiffs and John Taugher, defendant, for $286.97 with interest and costs in favor of the opposants ; that this judgment was registered on the 7th August, 1874, with a notice stating that official numbers 632 and 606 of St. Ann's Ward, were affected by said judgment, *which property* has been sold in this cause (*sic*); that the interest accrued, from the date of judgment until the filing of the opposition, amounts to $115.68 ; that the costs incurred amount to $37.65 and the further sum of $5 on execution,—forming a total sum of $446.07, for which the respondents demanded collocation and payment.

By the 9th item of the draft of collocation prepared by the prothonotary, the respondents' claim was collocated as follows :—

"9th, to the opposants Charles S. Watson and consorts, amount of their claim founded upon a judgment rendered on 10th April, 1874.....	$286.17
Interest for 2 years and current year from 10th April to 30th Nov.....	44.46
Costs taxed upon said judgment.....	37.65
And costs of execution.....	5.80
Costs of opposition to Messrs. Ritchie & Ritchie.....	11.70
	$385.78"

The appellants, as plaintiffs and as creditors mentioned in the registrar's certificate, and as such collocated for part of their claim, contested both the opposition and the collocation of the respondents, and alleged : That the defendant, John Taugher and his wife, were married at Montreal, on the 27th June, 1848, without any written contract ; that by will, at Montreal, on the 8th August, 1870, before Longtin, N.P., and witness, John Mulhall bequeathed to his son-in-law, defendant Taugher, and to his daughter Mary Mulhall, wife of said J. Taugher, all his property movable and immovable, and ordered that the same be exempt from seizure ; that the real property

sold in this cause, and out of the proceeds of which, the said C. S. Watson *et al.* were collocated by said item No. 9, belonged at the time of his death, to the said John Mulhall, who died on the 24th February, 1873; that upon the death of John Mulhall, the property sold in this cause devolved to and became the private property of said Mary Mulhall, by virtue of Art. 1276, C. C.; that the will was registered with a declaration of the date of John Mulhall's death and a notice that No. 606 of St. Ann's Ward, which is the lot sold in this cause, formed part of the immovable property bequeathed; that the judgment upon which the opposition of said respondents was founded and on which they were collocated, was rendered against defendant John Taugher personally, and for a personal debt of the latter; that the said property bequeathed and sold, being the private property of the said Mary Mulhall, and not being an acquisition of the community, was not liable for the debts of the community, nor for those of J. Taugher, and that consequently no creditor of the latter could claim any portion of the proceeds of the sale of the property; further, that by the will of John Mulhall, the defendant Taugher could not mortgage the property so bequeathed and sold in this cause, without the consent in writing of his wife, which consent was not obtained in favor of C. S. Watson *et al.*; and moreover, Taugher did not even grant said mortgage nor consent to it, but the same was obtained by registering upon the property the judgment obtained by Watson *et al.* against Taugher, and for which they were collocated; that the judgment obtained by the plaintiffs, appellants, although personally rendered against John Taugher, was binding against his wife, inasmuch as it was based upon an obligation contracted to acquit a debt due by the testator John Mulhall.

The appellants therefore prayed that it be declared that Watson *et al.* had no right to be collocated, and that their opposition and collocation be dismissed; and that the 9th item of the order of collocation be struck out; and that a new order be prepared, granting the amount of said item to the next registered creditor, the appellants.

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The respondents filed no answer to this contestation. The failure of respondents to answer, cannot be attributed to want of knowledge of the contestation, because they filed papers, in support of their collocation, after the contestation was submitted to the Court.

However, the appellants wished to leave no doubt either on the soundness of the position by them assumed, or on the equity of the respective contentions of the parties. The appellants had already filed, with their opposition, the deed on which it was based. It was an obligation and mortgage, 16th July, 1875, given by John Taugher,—and in that deed, the wife, owner of the property, had intervened and declared, under authorization, that she approved, ratified, and confirmed the said deed, declaring that it was granted by her special consent and at her own special request, renounced for herself and for the child or children born or to be born, issue of her marriage with the said John Taugher, to all dower or any other matrimonial rights of any nature whatever on the said property. With their contestation, the appellants filed the will of John Mulhall, and the copy of judgment rendered on the opposition of Mary Mulhall, on the 30th Sept., 1880,—in which it was pronounced as follows:—

"Considérant qu'il est prouvé que l'immeuble saisi en cette cause (the same as sold) est un bien personnel venant à l'opposante (Mary Mulhall) de son père John Mulhall, en vertu du testament de ce dernier, en date du 8 août 1870 et de l'opération de l'article 1276 du Code Civil; considérant que si d'un côté le dit immeuble est déclaré insaisissable sur le défendeur et sur son épouse, en autant que faisant partie des biens légués par le dit testateur, de l'autre côté le dit John Mulhall, par son même testament, n'a prohibé l'aliénation et l'affectation hypothécaire des dits biens par le défendeur, son gendre, que dans le cas où il le ferait durant la vie de l'opposante (Mary Mulhall) et sans le consentement par écrit de cette dernière, et que l'opposante a donné son consentement par écrit, en devenant partie à l'obligation du 16 juillet 1875, qui fait la base de la demande en cette cause et du jugement en vertu

duquel la saisie a été pratiquée ; de plus, sans perdre de vue que la dite opposante *n'aurait pas eu le droit de consentir légalement la dite obligation* du 16 juillet 1875, en contravention à l'article 1301 du C.C., *si la cause de cette obligation avait été purement et simplement* une dette du défendeur ; mais considérant qu'il est établi, par acte authentique, savoir, l'obligation du 21 juillet 1870, consentie par le dit John Mulhall,—que le dit immeuble était hypothéqué, par le dit Mulhall lui-même, au montant de $2440 ; qu'il est établi encore, par une autre obligation authentique, signée par le défendeur et l'opposante du 9 mai 1873, qu'il y avait une hypothèque de $1800 encore due à la Société Permanente de Construction Provinciale ;—considérant qu'il est prouvé par la quittance de cette dernière Société, en faveur du dit défendeur (John Taugher) et de la dite opposante,—en date du 19 juillet 1875, que partie de l'obligation hypothécaire de John Mulhall a été acquittée par le défendeur (Taugher) et l'opposante, avec des deniers provenant de la demanderesse (the appellants), et que cela constitue plus qu'un commencement de preuve par écrit, suffisant pour permettre la preuve orale ; considérant qu'il est établi ensuite par preuve testimoniale et même écrite, que les deniers, empruntés de la demanderesse (appellants) par l'obligation du 16 juillet 1875, ont servi à payer en partie, du moins, la dite obligation et hypothèque, consentie par le dit John Mulhall, l'auteur de Mary Mulhall, sur l'immeuble saisi en cette instance, et que c'était là une cause légale et légitime à son engagement du 16 juillet 1875, au moins jusqu'à concurrence de la somme ainsi obtenue pour solder la balance de l'hypothèque créée par le dit Mulhall ; considérant que, sous ces circonstances, Mary Mulhall est mal fondée à s'opposer à la saisie même de l'immeuble, faite en exécution d'une obligation valablement consentie par elle pour une portion au moins, et qu'elle ne peut tout au plus que s'opposer plus tard, s'il y a lieu, à ce que tous les deniers provenant de la vente à faire du dit immeuble soient versés entre les mains de la demanderesse, dans le cas où le montant de tels deniers excèderait celui de la portion de la dite obli-

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gation qui aurait servi à solder la balance restée due sur l'obligation créée par le dit Mulhall,—la Cour maintient la contestation et renvoie la dite opposition—etc., etc."

This judgment contains a perfect appreciation of the facts, and a sound application of the law. If we apply the law so stated, we arrive necessarily at a different conclusion from that of the judgment appealed from. If that judgment should be confirmed, Article 1301, C.C., would be disregarded *in toto*. The obligation of the wife, for a debt of her husband, would prevail as a mortgage, on the property of the wife, over and in preference to the personal and hypothecary debt of the wife.

R. A. Ramsay, for the respondents :—

The real intention of Mulhall's will is to take the bequest out of C.C. 1276, because if not, *cui bono* all the clauses prohibiting Taugher from selling, mortgaging, etc., during the life of his wife without her consent in writing? This shows the intention that the property should fall into the community, but to limit the husband's powers.

RAMSAY, J. (*for the Court*) :—

This case comes up on appeal from a judgment dismissing the contestation of an opposition for monies.

The opposants (respondents) obtained judgment against John Taugher, and seized in execution certain real estate. Taugher's wife, Mary Mulhall, put in an opposition claiming that the property was hers. This opposition was contested by respondents, and the opposition of Mrs. Taugher was dismissed by a judgment in the following terms :—(*Cited above*).

Previous to all this, and to the date of the obligation, owing to which it was held that Mrs. Taugher's real estate might be taken in execution and sold under a personal judgment against her husband, respondents had obtained a judgment against Taugher, and had registered it against the real estate in question which stood, or appeared to stand, in the name of Taugher and his wife. On the judgment and securing hypothec opposants claimed on the proceeds of the sale of the real estate, and they were

collocated. Subsequently to them the appellants were collocated for the sum of $995.15, and they contested the collocation of opposants, on the ground that the property seized by them on John Taugher, was not really John Taugher's property, but his wife's; that Taugher could not hypothecate it without the consent of his wife in writing, and that she had not given such consent. This contestation was dismissed solely on the ground that appellants' debt being fully paid, nay, over-paid, they had no interest to raise the question.

Now, that is really the whole question before us. It has been attempted to escape from this question by saying that appellants are in the same position as opposants; that they have seized the property as Taugher's, and that they cannot now say to opposants, that the property is not Taugher's. To this appellants answer that by the judgment on Mrs. Taugher's opposition, appellants' judgment was declared executory against Mrs. Taugher.

Both the proposition and the answer appear to me to be bad. The judgment on Mrs. Taugher's opposition did not declare the appellants' judgment against Taugher common against her. It only dismissed her opposition. But the real answer is, that the proceeds of the sale are before the Court, and it is not now a question as to whether the proceedings by which the sale was brought about are regular, but to whom the moneys properly belong. It seems perfectly clear that opposants' title to be collocated at all is bad. The property is Mrs. Mulhall's, and anybody who has an interest to raise that question can do so just as well as Mrs. Mulhall. Appellants then have that right, unless they are fully paid the amount of their claim, under the deed of the 16th July, 1875, and so far as that deed is lawful.

The appellants having an interest say, respondents' title is bad, mine is good. We are with appellants on this point. The will of Mulhall gave the property to his daughter, Mrs. Taugher, with the right to Taugher to hypothecate with the consent of his wife in writing. The Building Society have an hypothec so granted. The respondents

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have not. The former must, therefore, prevail, and appellants must have judgment, not to send the case back for a new distribution, but the present judgment of distribution is amended by giving appellants the money for which respondents are collocated, with costs.

The judgment in appeal is as follows :—

"Considering that over and beyond the amounts for which they have been collocated, in the report of distribution and of collocation made and filed in this cause on the 3rd of January, 1881, the appellants have no interest preferable to that of the respondents in the sums and amounts for which the said respondents have been collocated in and by the said report;

"Considering that there is error in the judgment herein rendered by the Superior Court at Montreal, on the 30th of June, 1881, dismissing the contestation by the appellants of the collocation of the respondents in said report, and that said contestation ought to have been maintained;

"The Court of Our Lady the Queen now here, doth cancel, annul and set aside the said judgment of the said Superior Court;

"And proceeding to render the judgment which the said Superior Court ought to have rendered, doth maintain the contestation of the appellants of the said collocation of the respondents, and doth cancel, annul, set aside and hold for naught the ninth item of collocation in said report, therein included the claim of the said respondents for capital, interest and costs, as well costs of suit as of opposition; and doth order and direct a new report of distribution and collocation to be prepared and filed, awarding the amounts which had been appropriated by said ninth item now set aside, to whomsoever the same may lawfully appertain, according to the rank and priority of claims, but giving preference to the claim of the appellants over that of the respondents, with costs, etc."

Judgment reversed.

Doutre & Joseph, attorneys for appellants.

Ritchie & Ritchie, attorneys for respondents.

(J. K.)

December 9, 1884.

Coram DORION, CH. J., MONK, TESSIER, CROSS, BABY, JJ.

EDWARD H. EATON ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

PATRICK MURPHY ET AL.,
(*Plaintiffs in Court below*),
RESPONDENTS.

Prescription—Art. 2261, *C. C.—Description of property—* "*West side*" *of river—Change of course.*

HELD:—1. That a claim for the value of wood wrongfully cut and carried away from plaintiffs' land, is not prescribed by two years, the prescription of C. C. 2261, § 2, not being applicable to such claim.

2. That where a deed conveyed all the land of lot 10 to be found on "the west side of the river" which runs through the lot, all the land on the west side according to the general direction of the river through the lot was included, although in consequence of a bend in the stream and a change of course from south to north, a portion of such land lay geographically on the east side of the curve.

The appeal was from a judgment of the Superior Court, district of Iberville (CHAGNON, J.), April 9, 1883, in the following terms:—

"La Cour, etc.....

"Considérant qu'il appert suffisamment par l'acte de vente du nommé Henri DesRivières au nommé James O'Neil, en date du 27 avril 1843, que le dit acquéreur James O'Neil a acheté et est devenu acquéreur de toute la partie du numéro dix du cinquième rang du township de Stanbridge, se trouvant à l'ouest de la rivière appelée Pike River;

"Considérant que sur le lot dont il est question, la dite rivière décrit, dans une partie de son parcours, une courbe, laquelle contient dans ses limites une étendue de terrain appartenant à ce même lot et étant de dix-sept ou dix-huit arpents en superficie;

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"Considérant que pour supputer quelles sont les parties du dit lot qui se trouvent à l'ouest de la dite rivière, il faut, regardant le nord, distraire du dit lot, comme inclues dans la dite vente, toutes les parties d'icelui qui se trouvent à l'ouest non-seulement de la première branche de la dite rivière, parcourant toute la largeur du dit lot, mais aussi celles qui se trouvent à l'ouest de la seconde branche, dont le détour forme la courbe dont il est question plus haut ;

"Considérant que par une telle interprétation du dit acte de vente, interprétation qui du reste découle de ses termes, les dix-huit acres de terrain en question se trouvent inclus dans la vente faite par le dit Henri Des-Rivières au dit O'Neil ;

"Considérant qu'il appert d'ailleurs, tant par la plaidoierie que par la preuve, que dans le printemps ou au commencement de l'été 1877 les défendeurs auraient abandonné et fait remise aux représentants du dit James O'Neil des dix-huit acres de terrain en question, reconnaissant par là même les représentants du dit James O'Neil comme étant les propriétaires du morceau de terrain en question ;

"Considérant que cette remise et abandon résultent, tel que la Cour le trouve, de la plaidoirie en autant que les défendeurs n'ont pas dénié par des répliques le fait de telle remise et abandon, alléguée spécialement par les demandeurs dans leurs réponses ;

"Considérant de plus, que la preuve constate le fait de telle remise, non à titre d'arrangement entre les parties, car il est suffisamment constaté par la preuve que les offres d'arrangement proposées n'ont pas été acceptées par les défendeurs, mais considérant qu'il appert suffisamment par la preuve que les défendeurs ont exigé que les représentants du dit James O'Neil et spécialement les demandeurs acceptassent telle remise afin qu'eux, les défendeurs, n'eussent point à encourir les frais d'une action pétitoire de la part des représentants du dit James O'Neil ;

"Considérant que cette remise et abandon va à confirmer l'interprétation ci-dessus donnée au titre du dit

James O'Neil, en date du 27 avril 1843, et considérant que les défendeurs par leur propre titre, n'ont pas acheté spécialement les dix-huit acres en question, mais n'ont acheté que le reste du dit lot No. dix, déduction faite de ce qui avait été vendu au dit O'Neil par et en vertu du dit acte du 27 avril 1843 ;

" Considérant qu'il appert aussi par la preuve que les défendeurs, avant la passation de leur contrat d'achat, ont été notifiés du fait que le dit O'Neil prétendait être propriétaire des dix-huit acres en question, et que les défendeurs, nonobstant telle notification, auraient déclaré qu'en vertu du titre qu'ils voulaient avoir des successeurs du dit Henri DesRivières, ils entendaient se déclarer propriétaires de ces dix-huit acres, et prendre le risque des réclamations du dit O'Neil ;

" Considérant que les défendeurs ayant reconnu le droit des représentants du dit O'Neil à la propriété des dits dix-huit acres de terre, et leur ayant abandonné la possession du dit terrain, ne peuvent plus aujourd'hui prétendre que le bois qu'ils ont coupé sur ce même terrain, était leur propriété, et qu'ils n'ont pas à en remettre la valeur aux demandeurs ; et considérant qu'un jugement déclarant les défendeurs propriétaires du bois en question, irait à consacrer le droit des défendeurs à la propriété du terrain lui-même, qu'ils ont cependant abandonné dans le but de s'éviter les frais de l'action pétitoire dont ils étaient menacés ;

" Considérant que la preuve testimoniale faite dans la présente cause relativement aux faits de possession des dix-huit acres dont il est question, est très-contradictoire, et considérant qu'il appert suffisamment que dans l'espèce la Cour ne peut guère recevoir une preuve verbale des aveux prétendus faits par le dit O'Neil, en autant que la dite preuve ainsi faite sans commencement de preuve par écrit, irait à contredire les termes du dit acte de vente du 27 avril 1843, et serait aussi en contradiction avec la reconnaissance faite par les défendeurs des droits des représentants du dit James O'Neil, reconnaissance découlant des dits abandon et remise faites dans les circonstances

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indiquées et résultant aussi de la plaidoierie et procédure du dossier, tel que plus haut expliqué ;

" Considérant qu'il appert suffisamment par la preuve que les défendeurs ont coupé et enlevé sur le morceau de terre dont il est question, durant les hivers de 1871 et 1872 une quantité de bois étant la propriété de la demanderesse en vertu du testament du dit James O'Neil, et de celui de Mary Cavener, son épouse, tel que récité dans la déclaration ; et considérant que la valeur du bois ainsi enlevé par les défendeurs, ne peut s'élever, d'après la preuve, à une somme moindre que celle de $200, au paiement de laquelle somme, la Cour, se fondant sur la preuve au dossier, est d'opinion de condamner les défendeurs pour les faits et causes indiqués dans la déclaration ;

" Considérant qu'il appert par le dossier que les demandeurs sont aujourd'hui les représentants du dit feu James O'Neil, quant à la réclamation du bois ainsi enlevé par les défendeurs sur le terrain en question ;

" Considérant que le plaidoyer de prescription, plaidé par les défendeurs n'est pas fondé et doit être débouté ;

" Renvoie les défenses *pro tanto* et condamne les défendeurs solidairement à payer aux demandeurs ès-nom et qualité la dite somme de $200 pour les causes indiquées dans l'action, avec intérêt du jour d'assignation, et les dépens, distraits à, etc."

Sept. 25, 1884.]

Laflamme, Q. C., for the appellants.

Lacoste, Q. C., and *G. B. Baker, Q. C.*, for the respondents.

BABY, J. (for the Court) :—

Pour bien comprendre cette cause, il faut en relater les faits.

La déclaration en cette cause allègue que par acte de vente fait sous seing privé, à Stanbridge, le 27 avril 1863, feu M. Henri Desrivières vendit au nommé James O'Neil, pour le prix de $214.00, une certaine étendue de terre formant partie du lot No. 10 dans le 5e rang du township de Stanbridge, situé à l'ouest de la rivière, les vendeurs se réservant le droit de construire une chaussée en travers

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de la rivière et aussi celui de garder un acre de terre tout auprès de cette chaussée. Que O'Neil prit possession du terrain ainsi vendu et que ce dernier était alors de la contenance de 117 *rods* de front sur le chemin, 73 *rods* dans la ligne sud du chemin vers le rivage ouest de la rivière au Brochet, et 217 *rods* du chemin en suivant la ligne nord du lot No. 10 à un point où la dite ligne nord traverse la dite rivière, et puis suivant le côté ouest de la rivière en descendant le cours d'eau jusqu'au point où la ligne sud du dit lot vient la frapper, contenant 84 acres, 2 *roods* et 22 perches en superficie, mesure anglaise, l'acre de terre réservé non compris.

Que dans le cours de l'hiver des années 1871-72 et pendant la possession comme propriétaire par le dit O'Neil du dit immeuble, les défendeurs alors en société, illégalement et sans permission, tant par eux-mêmes que par leurs serviteurs et employés entrèrent sur la propriété et là, illégalement et sans permission, buchèrent et coupèrent un grand nombre d'arbres de diverses essences, érables, hêtres, mérisiers et cèdres croissant alors sur le dit terrain et de grande valeur, la propriété du dit James O'Neil, et les convertirent tant en bois de corde qu'en billots, le tout d'une valeur de $850.00.

Qu'après avoir ainsi illégalement coupé et buché ce bois, les défendeurs l'enlevèrent et se l'approprièrent, refusant de payer à O'Neil la dite valeur.

Que le 13 mai 1872, O'Neil serait décédé après avoir fait son testament par lequel il instituait son épouse, Mary Cavener et sa nièce, Jane Kenselah, ses légataires en usufruit de ses immeubles et légataires en propriété de ses meubles, dont du tout elles se mirent en possession à ces divers titres.

Que par après, le 3 d'août 1876, la dite Mary Cavener serait aussi décédée après avoir fait son testament par lequel elle légua en pleine propriété à la dite Jane Kenselah, sa nièce, tout ce qui lui appartenait de sa succession mobilière.

Qu'à raison de ce dernier legs, la dite Jane Kenselah et son époux qui est commun en biens avec elle, à la mort

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de sa tante, Mary Cavener, sont devenus saisis des droits du dit O'Neil contre les défendeurs, et qu'ils réclament d'eux maintenant la dite somme de $850.00.

Les défendeurs de leur côté disent d'abord que l'action des demandeurs est prescrite, et ensuite plaident qu'il est vrai que James O'Neil, en son vivant, possédait la propriété achetée par lui de feu M. Henri Desrivières, c'est à savoir: la portion du lot No. 10, dans le 5e rang de Stanbridge, à l'ouest de la rivière, mais nient que la ligne nord de la propriété telle que vendue et possédée par O'Neil mesurait 217 *rods* du chemin à la rivière.

Que vers le 16 d'octobre 1871, par acte de vente, reçu devant notaire, François Guillaume Desrivières, pour lui-même et sa sœur, Dlle Marie Caroline Desrivières, héritiers et représentants légaux de feu Henri Desrivières, vendirent aux défendeurs alors en société certains immeubles y désignés, entr'autres, 1o. un acre de terre formant partie du lot No. 10, situé à l'ouest de la rivière du Brochet, et 2o. tout le reste et résidu du dit lot No. 10, dans le 5e rang de Stanbridge, après avoir pris et déduit ce qui en appartenait à James O'Neil sur le côté ouest de la rivière tel que décrit en l'acte de vente de feu Henri Desrivières à James O'Neil, etc. (Voir désignation.)

Que les défendeurs se mirent de suite en possession de la propriété qui leur était ainsi vendue et qui renfermait le terrain sur lequel le bois en question a été coupé, terrain qui se trouve à l'est de la dite rivière du Brochet, près de la borne nord du dit lot et entre le terrain de James O'Neil et la borne nord-est, et était avant la passation du dit acte de vente aux défendeurs inclus dans le mesurage des 134 acres de terre à eux vendus, et ne formait pas partie du terrain appartenant à O'Neil, et n'a jamais été en possession de ce dernier.

Que les défendeurs étaient de bonne foi lorsqu'ils ont coupé et pris du bois sur le terrain dans l'hiver 1871-72, mais que la valeur de ce bois pris debout n'était que d'à peu près $50.00 en tout, et qu'en le faisant, loin de causer un dommage, ils n'ont fait qu'améliorer le dit terrain et en augmenter la valeur.

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Les demandeurs répliquèrent aux défendeurs en leur disant: nous réaffirmons que vous n'aviez pas la possession légale du terrain lorsque vous y avez coupé le bois en question et l'en avez enlevé, et c'est si bien le cas qu'en 1877, lorsqu'on vous a informé que nous allions vous poursuivre au pétitoire et vous demander les dommages dont il est maintenant question, vous nous avez abandonné la possession de ce terrain et promis de nous payer les dommages que nous vous réclamons actuellement.

Ce sont là les prétentions respectives des parties.

La question de prescription a été écartée par les parties elles-mêmes; inutile donc de s'en occuper.

La seule question donc qui reste à résoudre est de savoir si, d'après l'acte de vente de Desrivières à O'Neil, on doit entendre toute la partie du lot No. 10 qui se trouve à l'ouest de la rivière du Brochet—Pike river.

La désignation du terrain vendu se lit comme suit dans l'acte: — "That certain tract or parcel of land, situated, "lying and being in the township of Stanbridge, known "and distinguished by the description of that part of lot "No. 10, in the 5th range of lots in the said township of "Stanbridge, lying west of the river."

Il est évident, d'après cette désignation, que tout le terrain du dit lot No. 10, qui se trouve à l'ouest de la rivière du Brochet, a été cédé à O'Neil par Desrivières, quelque soit la direction que puisse suivre ce cours d'eau dans ses méandres.

Cependant les appelants prétendent que par un changement de direction dans le cours de la rivière ce terrain se trouve leur appartenir, en vertu de l'acte ci-dessus en second lieu cité.

Or ici, il est clairement établi, tant par le plan de Corey, arpenteur provincial, que par la preuve au dossier, que le terrain en dispute se trouve situé sur la rive ouest de la rivière, malgré la courbe qu'elle décrit dans une partie de son parcours. Il faut donc dire que ce terrain est la propriété des intimés. C'est la seule interprétation raisonnable que l'on puisse donner à la clause en question,

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et c'est aussi d'ailleurs celle que paraît lui avoir été donnée par les appelants eux-mêmes, tel que le constate la plaidoirie des intimés sur ce point, non nié par les appelants et les témoignages au dossier. Nous ne comprenons point sur quoi les appelants pourraient s'appuyer pour faire prévaloir leurs prétendus droits au terrain en question. Le droit et la *bonne foi* leur font assurément défaut ici. Il est certain que ce morceau de terre n'a jamais été à eux et qu'en conséquence le bois qu'ils y ont coupé sans la permission et le consentement d'O'Neil ne leur appartenait point. L'action des demandeurs intimés en recouvrement de la valeur de ce bois était donc bien fondée, et le jugement qui la leur accorde, le seul que le tribunal de première instance devait rendre. Aussi cette Cour le confirme-t-elle avec dépens.

Judgment confirmed.

Laflamme, Huntington, Laflamme & Richard, attorneys for appellants.

G. B. Baker, Q.C., attorney for respondents.

(J. K.)

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19 septembre 1888.

Coram TESSIER, CROSS, CHURCH, JJ., et DOHERTY, J., asst.

ROBINSON v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Procédure—Frais—C. P. C. 453, 478.

JUGÉ:—Que le non-paiement des frais incidents, même d'appel, dans une cause ne peut pas suspendre la continuation de cette même cause, lorsque le tribunal qui a condamné aux frais n'a pas imposé le paiement comme condition préalable à la continuation.

TESSIER, J.:—

Dans la présente cause la compagnie dite Canadian Pacific Railway Company, a obtenu un jugement par lequel le verdict rendu contre elle dans un procès par jury a été mis de côté et un nouveau procès ordonné. Sur

cette procédure la demanderesse, Agnes Robinson, a été condamnée à payer à la dite compagnie certains frais.

En Cour Supérieure, la dite compagnie a fait motion que la cause fût suspendue jusqu'à ce que la demanderesse eut payé ces frais. La Cour a refusé cette demande, et c'est de ce jugement interlocutoire que la dite compagnie demande maintenant la permission d'appeler à cette Cour.

Il faut observer :—

1o. Que ce sont des frais incidents dans la même cause ; ce sont des frais en Cour d'Appel et en Cour Suprême encourus sur la demande d'un nouveau procès, qui a été accordé. La Cour d'Appel a déjà décidé ce point dans la cause de *Cutting & Jordan*, 19 L. C. J. 139, en 1875, où il a été jugé :—"The non-payment of costs on an incidental "proceeding in a suit cannot entitle the party to whom "the costs are due to a stay of proceedings until the costs "are paid."

2o. Que le jugement qui a prononcé la condamnation au paiement de ces frais n'en fait pas une condition préalable avant de procéder ultérieurement. La Cour qui a donné ce jugement aurait pu y avoir mis cette condition préalable, si elle l'eut voulu. Il en est donc des frais sur cet incident comme des autres frais dans la cause qui peuvent être déclarés compensés au jugement final, suivant l'article 478 du Code de Procédure, si toutefois ces frais ne sont pas soldés avant le jugement final.

3o. Que l'article 453, C. P. C. a été cité, mais il ne s'applique pas au cas actuel. Il ne s'agit là que du désistement fait volontairement par la partie, et on ne peut étendre cette règle au-delà, surtout lorsqu'elle peut avoir pour effet de faire perdre à l'une des parties son droit de continuer son action, si elle n'a pas les moyens de payer les frais encourus sur un incident.

4o. Que c'est l'article 478 du Code de Procédure Civile qui doit régir cette cause :—"La partie qui succombe doit "supporter les dépens, à moins que pour des causes spé- "ciales le tribunal ne juge convenable de les mitiger, "compenser ou en ordonner autrement." Le tribunal qui

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a condamné la dite Agnes Robinson au paiement de certains frais n'a pas jugé à propos d'en faire une condition préalable absolue, sans quoi elle ne pourrait procéder ultérieurement, et nos lois de procédure ne prononcent pas cette suspension de procédure. L'appelant a cru lui-même qu'il fallait demander un ordre à cet effet à la Cour Supérieure; celle-ci a exercé sa discrétion en ordonnant que le paiement des frais n'est pas dans le cas actuel une condition préalable à la continuation de l'action. Cette Cour d'Appel n'interviendra pas pour changer l'application de ce pouvoir discrétionnaire. *Vide* 24 L. C. J. 162, C. B. R. 1880. En conséquence, la motion pour permission d'appeler de ce jugement interlocutoire est rejetée.

Motion rejetée.

Abbotts & Campbell, pour la compagnie C. P. R.

Hatton, Q. C., pour Dame A. Robinson.

(H. J. K.)

September 22, 1888.

Coram DORION, CH. J., TESSIER, CROSS, BABY, DOHERTY, JJ.

THE PONTIAC PACIFIC JUNCTION RAILWAY CO.
(*Defts. and incidental plaintiffs in Court below*),
APPELLANTS;

AND

ROBERT BRADY,
(*Plff. and incidental deft. in Court below*),
RESPONDENT.

Railway—Animals straying on the track—Responsibility of railway company—Cattle guards.

HELD:—1. That when the employees in charge of the trains of a railway company discover animals upon the track they are bound to exercise proper care and prudence to prevent injury to them, and a mere slackening of speed will not be considered sufficient to relieve them from responsibility.

2. That no requisition or writing was necessary to put defendants in default for non-compliance with Consolidated Railway Act, 1879, sec. 16, as amended by 46 Vic., cap. 24, sec. 9.

3. That a railway company is liable for animals and cattle killed or injured by getting on the track of the railway in consequence of the absence of cattle guards, without reference to whether such animals were, as between their owners and the public, lawfully on the highway.

The appeal was from the following judgment of the Superior Court, district of Ottawa (WURTELE, J.), Oct. 25, 1886:—

"The Court having heard the parties by their respective counsel on the merits of the principal as well as of the incidental demand, examined the proceedings and proof of record, and having deliberated thereon;

"Seeing that the plaintiff demands of the defendants by his action, the sum of $280 as and for the value of a black mare and a black colt, belonging to him, which were killed on the 17th of June, 1885, upon that part of the track of the Pontiac Pacific Junction Railway situate in the sixth range of the township of Eardley, between the highway on the concession line of the fifth and sixth ranges and the highway on the concession line of the sixth and seventh ranges, by a passing construction train, through the fault of the defendant in not having made and maintained cattle guards at the crossings on the highways above mentioned;

"Seeing that the defendant pleads that the accident occurred through the want of ordinary care and prudence of the plaintiff in neglecting to maintain suitable and proper fences upon his farm, and in allowing his horses to stray and be at large on the highway, and that the defendant demands of the plaintiff by an incidental demand the sum of $200 as and for the amount of the damage done to one of the cars of the construction train by being thrown off the track and down an embankment by the collision of the train with the horses, alleging that the same was occasioned through the fault and negligence of the plaintiff;

"Seeing that it is in evidence that the first twenty

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miles of the Pontiac Pacific Junction Railway, which comprises the portion above mentioned, had been constructed for more than nine months before the accident in question, and that during the months of January and February, 1885, the contractor ran a passenger train over that portion of the railway between Aylmer and Quio, which includes the spot where the accident occurred; that the defendant had neglected and failed to make and maintain at the highway crossings above mentioned cattle guards suitable and sufficient to prevent animals from getting on the railway; that the horses of the plaintiff had escaped from their pasture on the plaintiff's farm in the seventh range of the township of Eardley, of which the fences were in fair order and were sufficient to restrain his animals; that the horses had entered upon the railway from the highway, between the sixth and seventh ranges, in consequence of the absence, at the crossing, of a proper cattle guard; that it would have been possible for the agents and servants of the defendant to have driven the horses behind the train and thus to have avoided the accident, and that the mare was worth $150 and the colt $65, making together $215;

"Considering that under the sixteenth section of "The Consolidated Railway Act, 1879," as amended by the Act 46 Vict., ch. 24, sect. 9, the defendant was bound to make and maintain cattle guards at the crossing over the highway between the sixth and seventh ranges of the township of Eardley, which would be suitable and sufficient to prevent cattle and animals from getting on the railway, and that in the absence of such cattle guards the defendant was liable for all damages done on its railway by its trains or engines, to cattle, horses or other animals;

"Considering that no requisition or writing or otherwise was necessary to put the defendant in default for its delay and negligence in making such cattle guards, and that the duty of making and keeping cattle guards at highway crossings is for the protection of all animals, on the highways, and is a duty which the Railway Company owes to the public generally;

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"Considering that defendant is liable for cattle and animals killed by getting on the track of its railway in consequence of the absence of cattle guards, without reference to whether such cattle or animals were, as between their owners and the public, lawfully on the highway;

"Considering that the accident in question happened in consequence of the negligence and default of the defendant, and the absence of the exercise of due care on the part of its agents and servants;

"Doth dismiss the incidental demand with costs, and doth condemn the defendant to pay to the plaintiff the sum of $215 as and for the value of the horses belonging to him which were killed by a construction train on the railway of the defendant through its fault, with interest from the 18th of September, 1885 (date of the service of the action), until payment and costs;

"Doth adjudge that the plaintiff do take nothing by motion at the argument respecting certain objections to certain portions of the testimony, and doth grant distraction of costs, etc."

May 23, 1888.]

J. S. Hall, Q. C., for the appellants:—

The appellants contend that at the time of the accident, the railway was not yet constructed, and the lands had been taken by private contract, and no demand for fencing was ever made upon the company. The *motivés* of the judgment indicate and admit that if this part of the road was not constructed there would be no responsibility on appellants.

The attention of the Court is called to the other sections of the Railway Act which govern the present case, as to responsibility of the company to make cattle guards. By section 16 as amended by 46 Vict., chap. 24, sect. 9, "cattle guards or fences are not required to be erected "until three months after the construction of the railway, "or within six months after any land has been taken "possession of by the company, if required in writing by "the occupant." The evidence of W. R. Kenny shows

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that the lands along the railway in the vicinity of where the accident occurred had been purchased by private arrangement, and that as far as he knew, no demand had ever been made to put up cattle guards or fences along the line of the road. It is quite true that there is an admission to the effect that on the 3rd of September, 1884, the Railway Company applied for and obtained from the Department of Railways a certain sum of money in connection with the construction of the road. The appellants submit that this does not in any way show that the road had been constructed as required and intended by the Railway Act.

There was no license to operate the road at the time of the accident. The appellants conclude that up to the time of the accident there was no responsibility upon them to have cattle guards. The judgment admits that the railway company would not be liable to put these in until three months after construction. Construction can only mean completion of the road ready and *licensed* for *traffic*. During construction its liability to have cattle guards did not exist. The railway company were entitled during construction to go upon lands, prepare them for the railway, construct their road, and to this end, use construction trains for the purpose, and it was only after construction and completion, when trains would be regularly run on fast time conveying the public, that the liability to make cattle guards arises. Up to such time a railway company would only be bound to ordinary diligence in running a construction train, which was more than done in this case.

In the case of *Jasmin* v. *The Canadian Pacific Railway Co.*, 6 Leg. News, p. 163, Mr. Justice Bélanger held, in 1883, that a Railway Company is not responsible for the killing of animals straying and trespassing on its track.

H. Aylen, for the respondent:—

The cattle guards required by law where the railway crosses the highway, had not been constructed when the accident occurred, though the road had been built and used for traffic for over nine months. Immediately after

the killing of said horses the track was propped up and the necessary cattle-guards put in. It would have been impossible for respondent's horses to have got upon the railway had the cattle-guards that were subsequently put in been there before the collision. The horses ran for upwards of a mile in front of the train, and the servants of the appellants might easily have avoided killing them by the exercise of proper care and diligence.

It has for years been a well settled principle that the owner of domestic animals injured upon a railway is entitled to recover, on showing, either that it was through the fault of the company that they were enabled to come upon the track, or that after they were first discovered, their destruction might have been prevented by the exercise of due care on the part of the employees of the company. Redfield on Railways, p. 464.

The defect in the construction of this railway which the respondent especially complains of, was the absence of cattle-guards at the road crossing, and it is contended that in neglecting to provide the same the appellants were guilty of an inexcusable violation of a public duty, a violation that occasioned the loss for which respondent now claims redress.

CROSS, J. (*diss.*) :—

I am of opinion to reverse the judgment appealed from, chiefly on the ground that railway companies should not be held responsible for animals which are killed while trespassing on the track. The respondent's property does not adjoin the railroad ; his animals escaped from his own pasture field ; they were seen for several days straying on the public highway. It is not even proved at what place nor in what manner they got on the railroad. I may cite in support of this view the case of *Roux* v. *G. T. R.*,[1] decided in 1864.

DOHERTY, J. :—

The general law with reference to injuries to domestic

[1] 14 L. C. R. 140.

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animals is set out in Holt on Canadian Railway Law, p. 18, but we do not find that the cases referred to by that author are favorable to appellants' pretension. The appellants were guilty of negligence in the running of their train, and the text of the author cited is distinctly against them on that point. There was carelessness amounting to recklessness in the way in which the train was handled after the danger was seen. The horses were running on the track in front of the train, the driver "slowed down," but that did not prevent the destruction of the animals, which might have been avoided by the exercise of proper care.

As to the pretention that the road was not finished, the statute does not mean the entire completion of the road. Such a construction would be extraordinary. I agree also with the learned Judge in the Court below, that the appellants were bound to make cattle guards at the highway crossings, and in the absence of such guards they were rightly condemned.

Judgment confirmed, Cross, J., diss.

Chapleau, Hall, Nichols & Brown, attorneys for appellants.

H. Aylen, attorney for respondent.

(J. K.)

November 27, 1888.

Coram TESSIER, CROSS, CHURCH, DOHERTY, JJ.

ELEANOR H. HAIGHT,

(*Plaintiff in Court below*),

APPELLANT;

AND

THE CITY OF MONTREAL,

(*Defendant in Court below*),

RESPONDENT.

Educational Institution—Exemption from taxes—Recovery of money paid by error—Arts. 1047, 1140 *C. C.*

HELD:—1. That property occupied as a private boarding and day school for girls, where there are numerous pupils and teachers, and no grant is received from the municipality in which it is situated, is an educational institution, within the meaning of § 2, C. S. L. C., cap. 15, sec. 17, as amended by 41 Vic. cap. 6, sec. 26, and consequently exempt from municipal and school taxes.

2. Where, in ignorance of the exemption so created, money has been paid as taxes upon such property it may be recovered.

3. In such action, when it was alleged that such payment had been made under constraint, and it was proved to have been made voluntarily, but through error of law and of fact, an amendment to make the declaration conform with that proof was not an alteration sufficient to change the nature of the action, and should be allowed even after the case had been submitted.

The appeal was from a judgment of the Superior Court, Montreal, (LORANGER, J.), reported in M. L. R., 3 S. C. 65.

The appellant kept in Montreal a large boarding and day school for girls, and for that purpose she occupied during certain years her own property; during others she leased certain premises from the Montreal Investment and Building Association. During the years mentioned in the declaration the City charged those properties taxes which the appellant and the Association, in ignorance of the statutory exemption above recited, paid.

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The appellant was subrogated in the rights of the Association, and sued for $1186.02, the total amount so paid. The payments were alleged to have been made under constraint, but the proof shewed that they had been made voluntarily, but in ignorance of the exemption, and a motion was made, after the case had been submitted, to amend the declaration and make it conform with those facts.

Although no ruling was given upon the motion, the learned Judge in the Court below, after dismissing the action, stated that the amendment could not be allowed, as it would change the nature of the action.

Sept. 20, 21, 1888.]

K. R. Macpherson, for appellant, relied upon the clauses of the Acts above cited, and their interpretation by the Supreme Court of Canada in the case of *Wylie* v. *The City of Montreal*, 12 Can. S. C. R., p. 384 *et seq.*; and likewise upon the articles of our Code, 1047 and 1140, and argued that the amendment as moved for should be allowed, and that in any event, the question of error was part of the issues when the parties went to proof, as it had been raised by respondent's pleas, and therefore, the action was good even without the addition sought by amendment.

L. J. Ethier, for respondent, contended that appellant and the Building Association were properly charged with the amounts paid by them as taxes; that the assessment rolls were regularly made, and no complaint or protest was ever made against them within the legal delays, and those delays are final; that appellant and the Association were satisfying a just debt, and did not pay in ignorance or error of law or of fact, but *en pleine connaissance de cause*, voluntarily and without constraint.

CHURCH, J. (for the Court):—

We consider that Article 1140 of the Civil Code is quite applicable: "Every payment presupposes a debt; what "has been paid where there is no debt may be recovered." The appellant's establishment was exempt from taxation.

If there could be no taxation there could be no debt created, and if there was no debt the Article applies, and the appellant is entitled to recover. The amendment asked should have been allowed.

The judgment of the Court is as follows:—

" Considering that the appellant, plaintiff in the Court below, has established by evidence, that the property owned by her and described in the declaration, being official No. 612, St. Antoine Ward, in this city, was during the years 1878, 1879, 1880 and 1881, by her occupied and used as an educational institution within the meaning of the Statute, 41 Vic., cap. 6, sec. 26; and considering also that the said appellant has established by evidence that the property official No. 1626, sub-divisions D and E, during the years 1881, 1882, 1883, 1884 and 1885, was owned by the Montreal Investment and Building Association, and that during the whole of said years the same was used and occupied by the said appellant as an educational institution within the meaning of the aforesaid Act 41 Vic., cap. 6, sec. 26; that said educational institution did not at any time receive any grant from the defendant;

"And considering that it is shown that during the whole of the said years from 1881 to 1885, both inclusive, the same was by the said defendant assessed and taxed, which said assessments amounted to the sum of $659.10;

"And considering that it is also established that the said property hereinbefore firstly mentioned (to wit official No. 612 St. Antoine Ward), was also assessed and taxed by the said defendant for the said years 1878 to 1881, both inclusive, which said assessments and taxes amount to the further and other sum of $526.92; and considering that the said appellant has shown that she paid the said sum of $526.92 to the defendant under the usual notice that if not paid within fifteen days, execution would issue against her goods and chattels, and in ignorance of the fact that the said property was not assessable in law and in fact;

"And considering that it has been established that the said Montreal Investment and Building Association paid

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the said sum of $659.10 under a similar notice to the defendant; and considering that the said Association assigned all its right, title and interest in the said sum of $659.10 to the said plaintiff by deed of transfer duly signified upon the said defendant;

"Considering that the said appellant moved to be permitted to amend her declaration to make it agree with the facts proved, the whole as in the said motion set forth; and considering that the Court below should have permitted the same and should have granted the said motion;

"And considering that no judgment appears to have been pronounced thereon;

"And considering that it is shown that the whole of the said property was exempt from all municipal and school taxes during the said several years, and that no debt ever existed in favor of the said defendant for either of the said sums of $526.92 and $659.10, or any part thereof, or any obligation whatever ever existed to pay the same on the part of the said appellant towards the said defendant;

"And considering the provisions of Article 1140 of the Civil Code;

"And considering that in the judgment of the Court below to wit, the judgment rendered by the Superior Court at Montreal, on the 31st day of January, 1887, there is error;

"This Court doth cancel, annul and set aside the said judgment of the Superior Court in this cause rendered; and proceeding to render the judgment which the Court below should have rendered, doth adjudge and condemn the said defendant now respondent, to pay and satisfy unto the said appellant the sum of $1186.02 with interest thereon from and after the 5th day of June, 1886, date of service of process, the whole with costs, as well of this Court as of the Court below."

Judgment reversed.

Dunlop, Lyman & Macpherson, attorneys for appellant.

R. Roy, Q. C., attorney for respondent.

(K. R. M.)

November 19, 1883.

Coram DORION, Ch. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

JOHN J. REEVES,
(*Plaintiff in Court below*),
APPELLANT;

AND

ADAM DARLING,
(*Defendant in Court below*),
RESPONDENT.

Delegation—Not accepted—Effect of—Art. 1180 *C.C.*

HELD:—That delegation until it is accepted does not bind the parties delegants; it only operates as an *indication de paiement.*

The appeal was from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), Nov. 19, 1881, dismissing the appellant's action. (1)

The translation of the judgment (as printed in the appellant's factum) was in these terms:—

"The Court, etc.....

"Considering that the plaintiff (now represented by the plaintiff by *reprise d'instance*), by virtue of the indication of payment which she alleges to have duly accepted, would only be in the rights of Joseph Auguste Quesnel, and could only exercise the actions which the latter would personally have himself against the said Laframboise, Robitaille and Geriken, his vendors and the predecessors (*auteurs*) of the present defendant, and hypothecarily against the said defendant;

"Considering that at the time of the acceptation made by the plaintiff of the said indication of payment, there was nothing due to said Quesnel by the said Laframboise, Robitaille & Geriken, and that on the contrary, by reason of the action in warranty which the latter were intitled to exercise against him on account of the hypothecary

(1) See also *Reeves & Geriken*, 2 Leg. News, 67; 3 Leg. News, 383.

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action, then brought by the plaintiff against them as possessors, (*détenteurs*) of the three undivided fourths of the south half of the property in question in this cause, and seeing the sums of money by them already paid to Quesnel, at the time of the sale of the 17th October, 1874, the said Laframboise, Robitaille and Geriken were then the creditors of said Quesnel for an amount of several thousand dollars;

"Considering that on the said hypothecary action of the said plaintiff against Laframboise, Robitaille and Geriken for a larger amount than the one for which they might be personally liable, judgment was rendered condemning them to abandon the three undivided fourths of the said south half of the property above mentioned; that they have conformed to the said judgment and have made the surrender required from them;

"Considering that the plaintiff, after having brought the said hypothecary action, and having given to said Laframboise, Robitaille and Geriken the option of surrendering the said property, could no more accept with effect the aforesaid indication of payment, the things being no more intact (*la chose n'étant plus entière*), and that the acceptation which she made of it by the deed of the 4th December, 1877, could not confer on her any personal recourse against the said Laframboise, Robitaille and Geriken, nor consequently any hypothecary recourse against the present defendant;

"Dismisses the answer in law of the plaintiff by *reprise d'instance* as well as the motion to reject part of the evidence, maintains the pleas of the said defendant, and dismisses the present action with costs against the plaintiff by *reprise d'instance*."

Sept. 15, 1883.]

Joseph Doutre, Q. C., for the appellant.

S. Pagnuelo, Q. C., for the respondent.

RAMSAY, J.:—

This is an hypothecary action by the representative of Mme. Metzler against the respondent, who, it is pre-

tended, is the *détenteur actuel* of real estate hypothecated to Mme. Metzler.

On the 20th October, 1874, Mme. Metzler sold to Quesnel two pieces of land, which for brevity we shall call the south part of 4679, for $700 an arpent, calculated as amounting to $48,650. He paid one-fourth, $12,162.50, leaving still due $36,487.50. This balance was to be paid in four annual payments—14th October, 1875, $9,121.87½; 1876, $9,121.87½; 1877, $9,121.87½; 1878, $9,121.87½, with interest at 7 per cent. payable semi-annually.

On the same day Quesnel also bought from Mme. Cadieux the north part of 4679.

Three days after, 17th October, 1874, Quesnel sold three-fourths of both his acquisitions for the sum of $49,612.50, of which he received $22,246.87½, leaving a balance of $27,365.62½, and the three purchasers promised to pay this balance each for one-third to Mme. Metzler, for account of Quesnel, and they hypothecated both lands for this amount. In other words, Laframboise, Robitaille and Geriken undertook to pay to Mme. Metzler for account of Quesnel, three-fourths of all that remained due to her on her sale to Quesnel.

Subsequently Laframboise and Robitaille sold each his fourth of the north part to Geriken, and Geriken sold the whole three-fourths to Darling.

The pretension of the appellant is that by the sale from Geriken to Darling the latter became the owner of the property sold by Mme. Cadieux to Quesnel, subject to the hypothecation to Mme. Metzler.

This action was met by two pleas; the first, *chose jugée*; the second, payment, and substantially that defendant's *auteurs* were evicted from a great part of the property by Mme. Metzler herself, representing more than any unpaid balance.

This is all, I think, more involved in appearance than difficult in reality. The plea of *chose jugée* is, I think, unfounded. Then as to the payment and the eviction, Mme. Metzler seems to have two means of getting at the property now in question—either by exercising the rights

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of her debtor Quesnel, or basing her claim on the delegation to her. Is either of these now within her reach ?

It is evident that if she is exercising the rights of Quesnel, any answer that would be good to Quesnel would be good to her. Now the answer to Quesnel was this : we have been evicted from the more valuable portion of the property, and we have actually paid you more than represents the rest.

If, again, she goes on the delegation, it is necessary to enquire, what is the nature of the delegation ? Until accepted it is what is called an imperfect delegation, that is, it is more than an *indication de paiement*, it is less than a delegation. Until accepted it is, therefore, under the control of the parties to it without the consent of the delegatee. It must be perfectly clear that if the imperfect delegation can be set aside between the parties by convention, until acceptance, it can equally be set aside by any fact which amounts to an extinction of the obligation, as for instance, by payment. Now, what is contended here is, that there was payment, or what is equivalent to it. In other words, Mme. Metzler's suit is not assisted by the delegation which was not accepted till after Quesnel was fully paid.

It has been said that in addition to all this, the bar to Quesnel's claim was owing to Mme. Metzler's own act. Striking as this seems at first sight, it does not appear to me to influence the question at all. Even a perfect delegation creates no novation, and Mme. Metzler might have exercised all her rights if before doing so she had bound the parties. Then she would have had all these people and all their joint property bound to her personally and hypothecarily.

If she is defeated of her right by her failure to accept *en temps utile* this delegation, it is unnecessary to pursue our investigation further. It may, however, be worth while to say that the dissertation of Mr. Troplong in No. 498 does not apply to our Code, even if his theory be correct as to the doctrine of the old law. I am inclined to think that the doctrine of the Roman law, adopted by

the Cour Royale de Colmar, and which Mr. Troplong treats with derision, is the true one, and, at all events, we have not left it in doubt. Our Code (Art. 1180) has specially affirmed the doctrine of Paulus, which Mr. Troplong attempts to overthrow. 1180. "The debtor consenting to be delegated cannot oppose to his new creditor "the exceptions which he might have set up against the "party delegating him although at the time of the delegation he were ignorant of such exceptions.—The foregoing rule does not apply if at the time of the delegation nothing be due to the new creditor, and is without prejudice to the recourse of the debtor delegated "against the party delegating him." Art. 199 (207) has been adopted as an expression of a rule upon which the French Code is silent, but the importance of which is noticed by Maleville, as cited. (1st Rep. of Codification Commissioners, p. 105.) This opinion is not in conflict with what was held as to sheriffs' sales in *La Banque du Peuple & Desjardins*,[1] and in another case lately where we held the same doctrine in this Court. The purchaser has no recourse against the public officer, and has it against the party who set him going. The purchaser never consented. He is not within the rule of Paulus.

Judgment confirmed.

Doutre & Joseph, attorneys for appellant.

Pagnuelo & St. Jean, attorneys for respondent.

(J. K.)

[1] 8 L. C. J. 106.

March 24, 1883.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

THE CITIZENS INSURANCE AND INVESTMENT CO.,
(*Defendants in Court below*),
APPELLANTS;

AND

LAJOIE ÈS QUAL.,
(*Plaintiff par reprise in Court below*),
RESPONDENT.

Insurance, Fire—Goods destroyed in premises other than those described in policy — Inspection by company's agent — Motion for judgment on verdict.

A policy of insurance was effected on goods of the insured in No. 319, and the insurance was afterwards renewed without variation of its original conditions. Before the renewal, the insured had extended his premises into No. 315, and the company's agent visited the esblishment, and saw the portion of both buildings occupied by the insured, and the goods contained therein. A fire destroyed the goods in No. 315, and slightly injured those in 319. In an action on the policy, claiming for the loss both in No. 319 and in No. 315, the jury found the facts as above stated, and both parties moved for judgment on the verdict.

HELD:—1. Reversing the judgment in Review, 4 Leg. News, 140, that where the findings of the jury are accepted by both parties as favourable to their respective pretensions, and the plaintiff moves for judgment on the verdict, the defendant may also move for judgment in his favor on the verdict, notwithstanding anything contained in Arts. 422, 433, C C. P.

2. That on the facts found by the jury as above, the judgment should be for the defendants as to the loss of goods in No. 315, the inspection of the premises by the company's agent, before the renewal of the policy, not being sufficient to establish an agreement to vary the terms of the policy in respect of the locality in which the goods were represented to be.

This appeal was from a judgment of the Superior Court in Review, at Montreal, April 29, 1881 (JOHNSON, TORRANCE, PAPINEAU, JJ.), condemning the appellants to pay the sum of $6,000, under the verdict of a special jury, rendered in the cause on the 13th of December, 1880; and reject-

ing the motion of the appellants for judgment in their favor, upon the same verdict. The judgment in Review is shortly reported in 4 Leg. News, 140.

JOHNSON, J. (in Review) :—

This is a jury case, and a verdict has been rendered, and the plaintiff moves for judgment upon it in his favor; and the defendants also ask that judgment on the same verdict may be given for them. By Art. 422, C. P., the motion for judgment on the verdict can only be opposed by means of a motion for a new trial, a motion in arrest of judgment, or a motion for judgment *non obstante veredicto*. The defendants take the last named course. By Art. 423, whenever the verdict of the jury is upon matters of fact, in accordance with the allegations of one of the parties, the Court may, notwithstanding such verdict, render judgment in favor of the other party, *if the allegations of the former party are not sufficient in law to sustain his pretensions.* Whatever may have been done before the Code, and some very strange things were done (see cases of *Ferguson* v. *Gilmore*, 1 L. C. J. p. 131, and *Higginson* v. *Lyman*, 4 L. C. J. p. 329) that is the law now; and that is the law laid down in the judgment of the Court of Appeal, in the case of *Fletcher* v. *The Mutual Insurance Co.*, disposed of last term.

The defendants do not now come before the Court, and ask to set aside this verdict, and get a new trial. They ask that the verdict should stand and remain as it is, and though standing, that they should get judgment. Why? Not because the declaration does not show a right of action, but because the evidence and the verdict show that the policy did not cover the loss! That is the sole ground taken in the motion, and therefore I will not look at any other ground—such as the sufficiency of the amendment made at the suggestion of the Court of Appeal. I will not supply a ground the party refuses to take. There is a consent, however, that the evidence be looked at. But what would be the use of that under any circumstances, since the only consequence, even of finding that the

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verdict was contrary to evidence, would be that the verdict should be set aside, and a new trial granted, neither of which is asked for; but only that the verdict standing as it does, may be allowed to stand, and judgment, *without new trial*, go for the defendant upon the record as it stands. That appears to me to be plainly impossible in the face of the verdict, which, whether founded on evidence or not, is not asked to be set aside; and under Art. 422 I think judgment must be entered for plaintiff.

As to the consent that the evidence should be looked at, the only consent of record is that of the 13th December (the day of trial), and it says that the evidence at the former trial is to serve at that one; and that upon the final hearing of the cause, the Court is to refer to it as explanatory of the verdict to be rendered. That was plainly a consent that the evidence was to be used for legal purposes, not for the purpose of giving the defendants a right to urge what they cannot urge by law; it is a consent merely that the evidence be looked at *pour toutes fins que de droit*, and cannot cover the defendants' adoption of a wrong remedy.

The judgment in Review is recorded as follows:—

"The Court, having heard the parties by their counsel upon two motions, the one on the part of plaintiff *par reprise d'instance*, made and filed on the 17th of December last, that the verdict of the jury rendered in this cause on the 13th of December, 1880, granting to said plaintiff *par reprise d'instance* the amount claimed in said cause, to wit: the sum of $6,000, with interest from the 31st of October, 1868, be confirmed by this Court, and that in consequence the defendants be condemned to pay to said plaintiff *par reprise d'instance*, conformably to the conclusions of the declaration, the said sum and interest; and the other motion, on the part of defendants, made and filed on the 24th of January, 1881; that upon the answers of said jury to the questions submitted to them, judgment be rendered in this cause in favor of the defendants and against the said plaintiff *par reprise d'instance*, dismissing the action against said defendants with costs against

the said plaintiff *par reprise d'instance*, because it appears upon the face of the record that notwithstanding the said verdict of the jury, the plaintiff has no right to recover any sum, and because it appears by the evidence of record and by the verdict itself, that the policy upon which the said action is based, was confined to the stock in the premises No. 319, St. Paul street, in the city of Montreal, whereas the stock destroyed by the said fire, and the loss of which is referred to in the verdict, and is sought to be recovered by the present action, was at the time of the said fire in the premises known as No. 315, St. Paul street, in the said city, which premises were not referred to or covered by the said policy. Having examined the record and proceedings had in the said cause, and on the whole duly deliberated, doth reject defendants' motion with costs, and doth grant the motion of said plaintiff *par reprise d'instance*, and confirm the said verdict of the jury so rendered on the 13th of December, 1880: in consequence doth adjudge and condemn the said defendants to pay and satisfy to said plaintiff *par reprise d'instance* the said sum of $6,000, with interest thereon from the 31st of October, 1868, day of service of process, till paid, and costs, *distraits*, etc. Mr. Justice Torrance dissenting."

Jan. 18, 1883.]

Hon. J. J. C. Abbott, Q. C., for the appellants:—

The action was brought on a policy of insurance upon the stock-in-trade of the plaintiff, consisting of boots and shoes; described in the policy as being contained in a three story house, "situate and being No. 319, St. Paul "street, Montreal," owned and occupied by the plaintiff as a manufactory.

While a policy was in force, Rolland leased the upper stories of the adjoining building, No. 315, the lower part of which was occupied as a restaurant; and he caused a door of communication to be opened through the brick wall between the two buildings, and thereafter used the the upper stories of No. 315 as a receptacle for similar stock-in-trade to that contained in No. 319.

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The questions at issue between the parties are:—

1. Whether or not the policy itself covered the stock-in-trade in No. 315?

2. If not, whether any agreement subsequent to the issue of the policy was made between the parties, which extended the effect of the policy over the goods in No. 315?

The appellants contend that the stock-in-trade in the building in question was not covered by the policy; and that no subsequent agreement was made extending the operation of the policy over those goods.

The respondent, who is Rolland's assignee in insolvency, insists that the stock-in-trade in No. 315 was covered by the policy, but does not clearly define on what grounds his contention rests.

The judgment appealed from does not deal with either of these questions. It grants the motion of the respondent for judgment upon the verdict, which it recites as "granting to said plaintiff *par reprise d'instance* the "amount claimed in said cause." And after declaring that it doth "confirm the said verdict of the jury," it dismisses the motion of the appellants for judgment on the same verdict, without giving any reason for doing so.

This judgment will need but little discussion, as it purports to deal with a state of things which never existed. There was no verdict granting to the respondent any sum of money whatever. The verdict was a special one, taken by consent of parties, upon the circumstances which had occurred, without pronouncing in favor of either party. The findings merely established what had taken place, and left it to the Court to decide what judgment should be rendered upon the facts so established.

The majority of the Court of Review, in rendering the judgment in question, seemed to be mainly governed by the idea that the appellant should have moved for a new trial, and not for judgment; but this also was obviously an erroneous view of the matter. The verdict rendered by the jury was so rendered by consent of the parties, because they did not differ as to the facts of the case in

any particular. There had been a former trial of the case by a jury, and the evidence then taken had been printed. This evidence was accepted by both parties as containing all that could be proved; and the verdict was based upon it. The findings relate in a clear and unambiguous manner the whole of the acts of the parties on both sides, in respect of the policy and of its renewal; and a consent is filed that for any further elucidation of those facts that may be required, the Court may refer to the evidence previously adduced. Upon those facts, as they are related by the jury, the appellants contend that the plaintiff's action cannot be sustained; while the respondent maintains that those facts are sufficient to warrant a judgment in his favor.

Under these circumstances it does not seem susceptible of argument that any other course was open to either party than to make a motion for judgment upon the verdict. Both parties admitted that the verdict of the jury was absolutely accurate. A motion for a new trial must rest upon the assertion that the verdict of the jury is inaccurate. Therefore, it was impossible for either party to make such a motion in this case. If the verdict of the jury had been different from what it was, either party could have moved for a new trial. Being what it was, both parties entirely concurred in all its findings; and therefore neither of them could move for a new trial.

The theory of a jury trial is that the jury find the facts, and the Court supplies the law. Juries were found to insist upon arrogating to themselves, the right of deciding as well upon the law as upon the facts. And therefore specific questions as to facts, were directed to be put to them, to prevent their giving a verdict in favor of either party, except in so far as any fact in the case was disputed. If either party contended that the answers of the jury to those questions were erroneous or unfounded, for any reason, he had a right to move for a new trial. But if neither party objected to the verdict on that ground, the Court, in conformity with the theory of jury trials, would proceed to pronounce a judgment upon the facts,

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by applying to those facts the legal conclusion deducible from them.

That is precisely the case in the present instance. The jury answered the specific questions with perfect accuracy, to the satisfaction of both parties. Upon those facts both parties considered themselves entitled to a favorable judgment. And both parties accordingly asked the Court for such judgment.

The judgment rendered was therefore entirely erroneous, in so far as it purported to be a judgment confirming a verdict, described as having been rendered in favor of the respondent. And the views of the majority of the Court, as stated verbally, in respect of the necessity for a motion for a new trial, were equally erroneous.

The appellants therefore will assume that the reasons given by the majority of the Court below will be held to have been unfounded, and that this Court will proceed to adjudge upon the merits of the real issues between the parties: as it may be justified in doing by the facts as found by the jury.

The facts of the case are as follows:—

On the 16th of February, 1867, the appellants issued a policy, numbered 1301, in favor of Gabriel L. Rolland, for $6,000, "on stock in trade belonging to assured, consisting of boots and shoes, leather, etc., manufactured "and not manufactured, etc.; and contained in a three "story house, built of stone and covered with patent "roofing, situate and being No. 319, St. Paul street, Mon- "treal, owned and occupied by assured, as a manufactory, "bounded on both sides by similar buildings."

While that policy was in force, Mr. Rolland leased the upper portion of the adjoining building, being No. 315, the lower part of which was occupied as a saloon. And he caused a door of communication to be opened in the brick wall between Nos. 319 and 315. He used the upper flat of No. 315 as an an additional warehouse; and, at the time of the fire referred to in the declaration, it contained a large quantity of goods, of the value of above $26,000. The premises described in the policy were also filled with

goods, to an extent in value exceeding the amount of all the policies of insurance upon them, namely, exceeding $26,000.

A few days before the 16th of February, 1868, one of the appellants' clerks called upon Mr. Rolland, to know if he wished the policy renewed: on which the latter proposed that it should be renewed at a lower rate of premium. The clerk replied that he could not decide upon that, but would speak to Mr. Muir about it, Mr. Muir being the manager of the company. Mr. Muir went down, looked at the premises covered by the policy, and at the adjoining premises, and declined to reduce the premium. He said, in effect, that he did not like the risk: that if the company had not already taken it, they would not now take it: but as they had it, they would continue it at the same rate. Thereupon the premium was paid by Mr. Rolland's book-keeper, who received from the company a receipt in the following terms:

"Received from G. L. Rolland, Esq., $24, premium on $6,000, insured "to him by policy No. 1301, which is hereby continued in force for twelve "months, to wit: from the 16th of February, 1868, until the 16th of "February, 1869."

For the directors of the said company,

GEORGE B. MUIR, *Manager.*

On the 21st of March, 1868, the building No. 315, was completely destroyed by fire, with all its contents. And by the same fire, damage was done to the stock-in-trade in building No. 319, to the extent of $1,126; the proportion of which, payable to the appellants under their policy, amounted to $246.

Mr. Rolland thereupon filed a claim upon the appellants for the full amount mentioned in the policy, as being due to him under its terms; the claim purporting to be for damage to the contents of the building covered by the policy, namely, No. 319, but making no mention whatever of the building No. 315. The company tendered him $246, which was their proportion of the amount of damage sustained by the stock in No. 319, but that tender was refused.

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The plaintiff then brought an action against the appellants for the recovery of the full amount of the policy.

The declaration set forth the execution of the policy; the description of the property insured, and of the premises in which it was contained, in the language of the policy as it has been already quoted, viz: on Mr. Rolland's "stock-in-trade contained in a three story house, "built of stone, and covered with patent roofing, situate "and being No. 319, St. Paul street, owned and occupied "by insured, as a manufactory, bounded on both sides "by similar buildings."

That in conformity to the terms of the said policy, the plaintiff renewed the *said policy* by paying another premium of $24 for the year, from 15th of February, 1868, to 15th February, 1869.

That among the conditions of the policy it was stipulated, that all persons insured and sustaining loss or damages by fire, should forthwith give notice to the appellants: and as soon after as possible deliver in a particular account of their loss or damage, signed by their own hand, and verified by their oath or affirmation.

That on or about the 21st of March, 1868, and while said policy was in force, the "building and premises *men*-"*tioned and described in said policy* were, by accident, partly "destroyed by fire; and the said stock-in-trade, boots, "shoes, and leather, manufactured and not manufactured, "therein described and covered by said policy, the pro-"perty of the said plaintiff, then contained in the *said* "*building*, and mentioned in the said policy, of a value "exceeding $35,000, was damaged and destroyed by said "fire, whereby the plaintiff suffered loss and damage to "an extent far exceeding $6,000, to wit: to the extent of "$35,000."

That on or about the 18th of April, 1868, the plaintiff notified the appellants of the said loss, and delivered to them a particular account thereof, and made proof thereof, *conformable to the policy.*

That other insurances existed on the property; but that the amount of loss exceeded the total insurance. Where-

fore the plaintiff prayed for a condemnation for the amount named in the policy.

The appellants pleaded, that there were other policies of insurance upon the stock-in-trade in question, amounting to $20,000, exclusive of their policy.

That it was not true, as alleged by the plaintiff, that he had suffered loss and damage to the goods covered by the policy issued by the said appellants, or by the other policies therein described, to the extent of $35,000; but that in fact, the whole of the loss or damage sustained by the plaintiff to the goods so insured, and for which the plaintiff could legally claim against the said insurance companies, including the appellants, under the said several insurances, amounted to a sum not exceeding $1,120, and no more.

That the proportion of that sum payable by the appellants under their policy, was $260, and no more; which sum they were always ready to pay, and had tendered to the plaintiff long previous to the institution of the action. And they brought that sum into Court with the plea and renewed their tender; praying that, except as to the amount admitted, the plaintiff's action should be dismissed. And that such dismissal should be with costs, to be paid out of the said sum.

The appellants also pleaded a general denial.

The tender was produced and filed, and the money deposited in Court.

The plaintiff joined issue generally upon the appellants' plea.

After the foregoing exact statement of the nature of the action, and of the contents of the pleadings, it is scarcely necessary to call the attention of the Court to the fact:—

1. That the action was brought for loss to the extent of $35,000, to the stock-in-trade *contained in No.* 319.

2. That the appellants pleaded, that the loss to *that stock* did not amount to $35,000, but only to $1,120, of which their proportion amounted to $260, which they tendered.

3. That the plaintiff replied generally.

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The main issue in the cause therefore was, whether or not the stock-in-trade of the plaintiff *contained in No.* 319, was damaged to the extent of $35,000? or to any, and if any, what larger amount than $1,120, as stated by the appellants?

Upon issue being joined, questions to be submitted to a jury were settled by the judge, and were so settled in accordance with the real issues. A trial by a special jury took place on the 24th of April, 1877; and the questions then submitted and the verdict rendered may be summarized as follows, the important findings being repeated at length:

Q. 1. Did the defendants execute and deliver to plaintiff the policy of insurance, etc., covering his stock therein described, and being in the building and premises No. 319, St. Paul street, Montreal?

A. Yes.

Q. 2. Was the said policy renewed by plaintiff, and in force, etc.?

A. Yes.

Q. 3. Were the buildings and premises mentioned *in said policy* destroyed by fire on or about the 21st March, 1868, and the stock of the said plaintiff contained therein of the description mentioned in the said policy, damaged and destroyed by fire?

A. The building was not destroyed, but the stock was damaged. *And the jury are unanimously of opinion that the Citizens' Insurance Company, having continued the insurance of Mr. Rolland's stock after Mr. Muir's visit to the premises* 315, 317, *and* 319, *on the 18th February*, 1868, *and not objecting to any part of the stock being in* 315, *that the stock from that day was all insured by the policy of the said company.*

Q. 4. Was as to the notice of loss, which it is not disputed was given as alleged; viz, of a loss in No. 319.

Q. 5. At what sum do you estimate the damage and loss sustained by the said plaintiff, caused by the said fire to the stock in trade covered by the said policy?

A. Full amount of policy.

Q. 6. As to other insurances, amounting to $20,000, which were admitted.

Q. 7. Did the plaintiff, notwithstanding such other insurances, suffer damage and loss to the said stock-in-trade and property, over and above the amount of such other insurances, and to the amount claimed by this action; and if not, to what amount over and above such other insurances?

A. Yes, he has lost to the amount claimed by the action.

Q. 8. As to the tender of $260, which is admitted.

Upon this verdict the plaintiff moved for judgment, and the appellants moved in arrest of judgment; for judg-

ment *non obstante veredicto*, and for a new trial. The Court of Review maintained the plaintiffs' motion, and dismissed those of the appellants, rendering judgment in favor of the plaintiff for $6,000 and interest.

The appellants appealed from that judgment, on the ground that the answer of the jury made in response to question three, was, as respects the first line thereof, equivalent to a verdict in favor of the appellants as to the claim for stock-in-trade in building No. 315. And that as to the latter part of their answer, heretofore printed in italics, it was entirely irrelevant to the issues between the parties, and should not have been regarded by the Court of Review as having any effect upon the judgment.

That it was entirely unwarranted by the pleadings, and unsupported by the evidence; and that it purported to be a decision upon the law of the question, which was beyond the functions of the jury.

That appeal was maintained; the judgment of the Court of Review was set aside for the reasons set up by the appellants, and a new trial was granted to the appellants.

The judgment of the Court of Review is reported in 21 L. C. Jurist, p. 262. The judgment of this honorable Court is reported in 1 Leg. News, p. 604.

Upon the record being returned to the Superior Court, the respondent, having previously taken up the *instance*, moved for, and obtained, leave to amend his declaration by inserting after the allegations setting forth the policy and its renewal, the following paragraph, namely:—

"That before and at the time of the said continuation, "or renewal of the said policy, *some changes and additions* "*had been previously made to the premises mentioned and des-* "*cribed* in the said declaration, and in the said insurance "policy."

"That the same were in existence to the knowledge of "the defendants at the time of the renewal, and that it "was only after the visit of the manager of the defen- "dants, who *who saw the changes made in the premises*, that "the policy was renewed, and that the defendants, by

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"renewing the policy with that knowledge, agreed to "continue the risk incurred by them in virtue of the said "insurance policy."

The Court will observe that this amendment contains no allegation that the appellants agreed to extend the effect of their policy to No. 315, but only that the appellants' manager "*saw the changes made in the premises,*" that is, the premises described in the policy, or No. 319. And the latter part of the amendment only claims that the appellants, by renewing the policy with the knowledge so conveyed to them, "agreed to *continue* the risk" incurred by them "*in virtue of the said insurance policy.*" Obviously this allegation does not assert that the appellants extended the risk or the operation of the policy; but only that they "*continued*" it "*as it existed*" in virtue of that policy. And that, admittedly, was only on goods in No. 319. The amendment does not even assert that the agent saw the portion of No. 315, in which the plaintiff had stored some of his stock; but only that he saw the changes made in No. 319. These consisted in the openings made in the party wall, which undoubtedly constituted an important change in No. 319. If the agent had not seen and accepted this change, the policy would not even have applied to the stock in No. 319; because the risk to that stock was thereby materially increased. And it was in consequence of this that the agent refused to reduce the premium, and was indifferent to the continuation of the business. But there is not in the amendment, or in the declaration as amended, any assertion; or even any indication of an intention to assert; that either the appellants or their agent agreed, or were asked to agree, that the policy should be extended so as to cover the stock in No. 315.

The appellants believed that the amendment had been prepared in this vague form by the respondent, because he feared to raise a clear and direct issue, and preferred to rely upon the chance of another volunteered opinion by the jury. They therefore determined to plead specially to the declaration, as amended, notwithstanding its

vagueness; and therefore filed a further plea admitting the renewal of the policy, but denying that there was any change in the risk, or that it was extended to any goods or stock in any other premises than those described in the original policy, namely the building No. 319. They alleged that the only change made in the building was causing a door to be opened in the side of it, whereby communication was opened with the adjoining house, No. 315, but that no addition was made to No. 319.

They further alleged that by one of the conditions of the policy it was provided as follows:—

"12. Insurance once made may be continued for such "further term as may be agreed, on the premium therefor "being paid, and a renewal receipt being given for the "same; and it shall be considered under the *original repre-* "*sentations* and *description* in so far as it may not be varied "by a *new representation in writing*, which in all cases it "shall be incumbent on the party insured to make, when "the risk has been *changed*, either *within itself*, or by the "*surrounding* or *adjacent buildings*."

And that by another condition it was agreed that every descriptive statement contained in the policy, should be held "to be a guarantee of the *continuance* of the state of "things described therein."

That no representation or notice in writing had ever been made or given to the appellants of any desire to extend the policy beyond the limits established by its terms; or to extend the area of the premises in which the goods to be covered by the policy were stored. And that so long as that was not done, the condition of the premises was warranted to be the same.

The issues being thus again joined, a *venire de novo* was issued, and a series of questions were ordered to be submitted to the jury.

Upon the jury being empanelled, the parties signed a consent in the following language:

"The parties consent that the evidence taken at the "former trial of this cause be read and received as evid- "ence upon the present trial; and that upon the final

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"hearing of the cause the Court may refer to such evid-
"ence as explanatory of the verdict rendered."

The appellants filed a plan of the building, which was admitted by the respondent. Answers to the questions submitted to the jury were prepared by the counsel of the parties, and the jury went through the formality of giving their answers in the form agreed upon. The facts in the case being all undisputed, the parties adopted this course to avoid difficulty as to the questions which had been settled by the judge, those questions being obviously not only insufficient in themselves, but calculated to mislead the jury. And both parties being desirous to have a decision of the courts upon the facts, without further litigation as to technical points or side issues.

The questions submitted and the answers given were as follows :—

1. Did the defendants execute and deliver to plaintiff the policy of insurance recited in the plaintiff's declaration, in consideration of the payment of the premium therein mentioned, covering his stock therein described, and being in the building and premises No. 319, St. Paul street, Montreal?

Ans.—Yes.

2. Was the policy aforesaid renewed by the said plaintiff and continued in force by payment of the premium mentioned therein, and was such policy in full force and effect on the 21st day of March, 1868?

Ans.—Yes.

3. Had the premises at the time of said renewal been subject to the changes and additions mentioned and described in the said declaration, and had they been before and previously viewed and visited by the defendants' agent and manager, George B. Muir?

Ans.—At the time of said renewal the plaintiff occupied for the purposes of his business the said No. 319, and also the upper part of the adjoining building No. 315, in St. Paul street, which he had not at the time of the issue of the policy, both buildings being used by him together as his business establishment. He had caused a door to be opened in the division wall between No. 319 and No. 315, and he had goods in each building of the full value of the policies held by him. The defendants' agent and manager, G. B. Muir, visited the premises previous to the renewal of the policy, and saw the portion of both buildings occupied by the plaintiff, and the goods contained in them.

4. Were the building and premises altered as above, mentioned in the said policy and declaration, destroyed by fire, on or about the said 21st day of March, 1868, and the stock-in-trade of the said plaintiff contained therein, of the description mentioned in the said policy, damaged and destroyed by the said fire?

Ans.—The building No. 315 was destroyed by fire, with all the goods contained in it. The stock-in-trade of the plaintiff in No. 319 was damaged to the extent of $1,120 by the said fire.

5. Did the plaintiff conform to the conditions of the said policy, and give notice to the defendants of his damage and loss sustained by the said fire, accompanied by a particular account thereof attested under oath as required by the said policy, on or about the 18th of April, 1868?

Ans.—Yes.

6. At what sum do you estimate the damage and loss sustained by the said plaintiff caused by such fire to the stock-in-trade and property covered by the said policy?

Ans.—The damage and loss sustained by the said plaintiff caused by such fire to the stock-in-trade and property in No. 319, was $1,120. The damage to the stock-in-trade and property in No. 315 was about $30,000.

7. Were there at the time of the said fire, other insurances upon the said stock-in-trade in the said premises, to the amount of $20,000, exclusive of defendants' policy, namely, $4,000 in the North British and Mercantile Insurance Company, $12,000 in the Scottish Provincial Insurance Company, and $4,000 in the Commercial Union Insurance Company: and if not state whether any and what other insurance then existed upon the said stock-in-trade?

Ans.—Yes.

8. Did the plaintiff notwithstanding such other insurances sustain damage and loss by the said fire, in the said stock-in-trade and property, and over and above the amount of such other insurances, and to the amount claimed by this action; and if not, to what amount, over and above such other insurances?

Ans.—The damage and loss by said fire to the stock-in-trade in the building No. 315 amounted to more than the total amount of the insurance held by the plaintiff. The damage and loss incurred by the plaintiff to the stock-in-trade and property in No. 319 amount in all to $1,120.

9. Did the defendants, on the 16th day of June, 1868, tender to the plaintiff by the ministry of E. H. Stuart, the sum of $260?

Ans.—Yes.

On the 14th of December, 1880, the respondent moved that the verdict rendered in this cause, on the 13th December, 1880, "granting to the respondent the amount "claimed in this cause, namely, the sum of $6,000, be "confirmed by the Court," and that the appellants be thereupon condemned to pay the respondent the sum of $6,000, with interest.

At the same time the appellants moved that judgment, upon the answers of the jury to the questions submitted to them, be rendered in favor of the appellants.

The respondent's motion was evidently erroneous, in asking to have a verdict confirmed which never existed.

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A reference to the questions and answers will show that the jury found no verdict in favor of either party, but merely gave the figures and facts, bearing upon the questions at issue between the parties. In fact, under the present system, no verdict could be given in favor of either plaintiff or defendant upon the conclusions of the declaration. And on a motion by the respondent for judgment upon the verdict, the Court should have decided whether the facts found by the jury were sufficient to justify a judgment in favor of the respondent. But as has already been intimated, the decision of the majority of the Court of Review, and the reasoning of the majority of the judges, rested upon the same error which the respondent committed, namely, that of assuming that the verdict was in favor of the respondent, and that the appellants were seeking to attack it. On the contrary, the appellants approved entirely of the verdict. They consented to its terms, and so far from assailing it, they propose to show that it excludes the possibility of any judgment for the respondent, and gives them the right to ask for a decision in their favor.

It will be perceived by the foregoing statement of the circumstances of this case, and by the verdict of the jury establishing them as matters of fact for the information of the Court, that the matters in issue may be reduced to one question which is practically one of fact, and not of law, viz: was there any agreement between Rolland and the appellants at the time of the renewal of the policy, to include the stock-in-trade in No. 315, as part of the stock-in-trade covered by the policy.

If any such agreement existed it must have been created:

1. With the concurrence and consent of both parties, evidenced by some instrument.

2. It must have been with such concurrence and consent, evidenced by other facts or circumstances of the case, legally established of record.

It is contended by the appellants that there is no evidence in writing of such an agreement, or of any express agreement of any kind. No question was suggested to

be put, or was put, to the jury, tending to elicit a finding that there was any such instrument or agreement: nor is there any finding in the verdict, indicating that any such instrument was ever even contemplated.

But there was an instrument executed by the appellants, and delivered to Rolland the plaintiff, evidencing the continuance of the insurance under the policy, without variation. This instrument is the renewal receipt issued by the company, and accepted by Rolland on the 16th of February, 1868, which declares that the premium then received, was the "premium on $6,000 insured to "him by policy No. 1301, which is hereby continued in "force for twelve months, etc."

Here, then, is written evidence of what the agreement between the parties really was, viz.: that the policy itself should be continued for another year. And the policy itself confines the insurance to the stock-in-trade in No. 319. It is therefore demonstrable, not only that there was no instrument or other formal evidence of an agreement between the parties, extending the policy over the stock in No. 315: but, on the contrary, that the parties by a written instrument deliberately agreed that the policy should be continued; which, of course, means that it should be continued without variation; for another year. And this is established not only by the written receipt as evidence of the intention at the time, but also by the second finding of the jury, which declares that the policy was renewed and was in full force and effect on the day of the fire.

The only other question which remains to be discussed therefore is the second one indicated by the appellants, viz.:

Whether there were other facts and circumstances proved in the case, which establish an agreement that the policy should be held to cover the stock-in-trade in No. 315. Or, in other words, whether the circumstances of the case are such as of necessity to imply such an agreement, because no other theory would be consistent with such circumstances.

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On this point the appellants submit that there is nothing to sustain the pretension that an agreement to cover the goods in the adjoining warehouse, must be of necessity implied from the facts.

The facts as found by the jury have been already recited, and may be summed up as follows :—

That the policy was issued ; was renewed without alteration ; and was in force on the 21st March, 1868, the day of the fire.

That on the 15th day of February, previous to the fire, Rolland had applied to have the policy renewed at a lower premium. That upon such application being made, the company's manager had visited and examined the premises covered by the policy, with a view to ascertain whether a lower premium could be accepted.

That at the time of the examination by the company's agent, Rolland was in possession of the adjoining warehouse, into which he had opened a door of communication from No. 319 ; that the agent saw this door of communication, and saw the adjoining warehouse, when he refused to diminish the rate ; and that in consequence of the door of communication having been opened, it was necessary for the agent to see the adjoining premises, in order to see how far the risk had been increased by the opening of such communication.

That on the occasion of the renewal of the receipt, and of the visit and examination by the agent, he was not asked to extend the policy over the stock-in-trade in No. 315, nor was it suggested that it should be so extended.

That on the 21st of March, 1868, and at the time of the renewal of the policy on the 16th February previous, the plaintiff had in each of the premises Nos. 315 and 319, an amount of goods in excess of the amount of all the policies held by him.

The recital of these circumstances is sufficient to show, that they do not lead to any implication, much less to any necessary implication, that the policy was extended over No. 315. None of them is in any degree inconsistent with the theory that the policy continued to cover only the goods in No. 319, according to its terms.

It is quite consistent with the latter theory, that the agent saw the door of communication, and saw the goods and stock-in-trade in No. 315 : Because it was his duty to see what was in No. 315 in order to judge of the risk to No. 319. If it had been filled with gunpowder, or coal oil, the risk to the goods in No. 319 would have been so much increased, that the policy on No. 319 would have been instantly discontinued, unless the plaintiff had been willing to pay a much higher rate of premium. And to form a just estimate of the value of the company's responsibility for the goods in No. 319, it was absolutely necessary that everything connected with the door, and what it led to, should be known.

If the stock-in-trade, which had previously been in No. 319, had been transferred to No. 315, and Mr. Muir was made aware of the fact, there would have been some presumption that the policy was intended to continue to cover it. But in reality, the stock-in-trade in No. 319 remained as before ; and at the time of the fire exceeded in value the entire amount of all the policies held by the plaintiff ; while the stock-in-trade in No. 315 was an additional quantity, whose value also exceeded the amount of all the policies held by the plaintiff. This fact alone should be sufficient to dispose of the pretension of the respondent. It is impossible to imagine that any insurance company, having a policy on goods in one building, would subsequently under the same policy and for the same premium, insure an equal quantity of goods in two different buildings, which to all intents and purposes constituted two separate risks, each for more than the full amount of the policy.

As a matter of fact, therefore, the appellants contend that there never was any agreement between them and the plaintiff Rolland, extending the effect of their policy covering the stock-in-trade in No. 319 over Rolland's stock-in-trade in No. 315. And they submit that without such agreement, the respondent cannot recover under the policy, for stock-in-trade in No. 315.

The appellants would only further remark that the

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claim of Rolland under similar policies, in respect of the same fire, for goods in No. 315 has been rejected by the courts.

The appellants therefore respectfully submit that the judgment of the Court of Review, granting the motion of the respondent to confirm the verdict said to have been rendered in his favor; and maintaining his action for $6,000, should be reversed with costs.

1. Because no verdict was rendered by the jury in the Court below in favor of the respondent.

2. Because the verdict of the jury in the Court below, found the facts and circumstances of the case as they occurred, to the satisfaction of both parties; but without pronouncing any verdict in favor of either party. And because the confirmation of their verdict did not involve the condemnation of the appellants.

3. Because the appellants had a right to move for judgment in their favor upon the verdict, and were entitled to such judgment.

4. Because the policy set forth in the plaintiff's declaration, did not cover the stock-in-trade in the building No. 315, the damage to which constitutes the subject matter of the principal part of the demand made by the present action.

5. Because the policy issued by the appellants, was renewed without variation of its original conditions, and therefore did not extend over the stock-in-trade in No. 315.

6. Because the defendant has failed to prove, and the verdict of the jury does not establish, any agreement to vary the terms of the policy in respect of the locality in which the stock-in-trade was represented to be.

7. Because under the terms of the policy, the appellants were not responsible in the event of any alteration in the original representation and description of the risk, except in so far as the same was varied by a new representation or description in writing, furnished by the assured.

8. Because in the claim made by the plaintiff upon the appellants, the loss claimed for is described as having

occurred to the stock-in-trade in No. 319, under the original policy. And because the action of the plaintiff does not include any claim for goods damaged or destroyed in No. 315.

9. Because by the terms of the policy the statement therein descriptive of the risk as being in No. 319, must be held to be a guarantee of the continuance of the state of things therein described.

Hon. R. Laflamme, Q. C., for the respondent:—

Par son jugement, la Cour de Révision siégeant comme Cour Supérieure rejeta la motion de l'appelante et accorda celle de l'intimé.

Il suffit de lire ce jugement et les notes de l'honorable juge Johnson, pour démontrer que cette motion de l'appelante est inopportune et mal fondée, et faire voir que ce n'était pas la motion qui aurait dû être faite dans l'espèce par cette dernière, d'après notre jurisprudence, le texte et le sens des articles de notre Code de Procédure Civile, cités dans ces notes de l'honorable juge Johnson.

La motion de l'intimé devait donc être accordée comme elle l'a été, et l'appelante condamnée comme elle l'a été justement sur les réponses du jury et d'après la loi en l'espèce.

La seule question à décider, à part cette question de procédure, est en conséquence la même que cette honorable Cour a déjà été appelée à décider, savoir: la police d'assurance émise par l'appelante en faveur du nommé Rolland, couvre-t-elle les marchandises incendiées dans les prémisses telles que changées et amendées (No. 315) avant le renouvellement de cette police, ces changements existant lors de ce renouvellement, à la connaissance du gérant (*manager*) de l'appelante, et la connaissance de ce dernier est-elle la connaissance de l'appelante? Nous croyons qu'il ne peut pas y avoir de difficulté sur ce point, et nous croyons que cette Cour, si les allégués de la déclaration eussent été suffisants, en serait venue à cette conclusion la première fois.

Mais voyons un peu. Le nommé Rolland est manufacturier de chaussures en la cité de Montréal depuis bien

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des années, et fait en même temps le commerce en gros de cette marchandise qu'il écoule sur les marchés des différentes provinces de la puissance du Canada. Ses affaires ont augmenté considérablement d'année en année, et il est aujourd'hui un des grands manufacturiers de chaussures de cette cité.

En 1867, il avait sa manufacture et son magasin au No. 319 de la rue St-Paul, dans une bâtisse lui appartenant, comprenant aussi le No. 317. Cette bâtisse comprenait deux magasins distincts construits par Rolland qui voulait les louer comme tels et les louait aussi avant de les occuper lui-même, en faisant alors, pour les besoins de son commerce, un seul et même magasin, au moyen de portes de communication, pour aller d'un côté à l'autre, qu'il fit pratiquer dans les murs des différents étages.

Les choses étaient dans cet état lorsqu'en février, savoir, le 16 février 1867, Rolland fit avec l'appelante un contrat d'assurance par lequel cette dernière, moyennant une prime de $24 qui lui fut payée, assura contre le feu jusqu'à concurrence de la somme de $6,000, pour une année à compter de la date ci-dessus, les meubles, effets et marchandises qu'il avait et pourrait avoir dans les prémisses ci-dessus, désignant dans la police qu'elle remit à ce dernier les meubles, effets et marchandises assurés, et les prémisses les contenant comme suit, savoir :

"On stock-in-trade belonging to assured, (that is to say) "to said respondent, consisting of boots and shoes, and "leather manufactured and unmanufactured, and con- "tained in a three story house built of stone and covered "with patent roofing, situate and being No. 319, St. Paul "street, Montreal, owned and occupied by assured as a "manufactory, bounded on both sides by similar build- "ings."

Pendant l'existence de la dite police, c'est-à-dire dans l'automne (en octobre ou novembre) de l'année 1867, Rolland se trouvant un peu à l'étroit dans ses prémisses, pour sa manufacture et son magasin, ayant toujours en mains une grande quantité de chaussures manufacturées, loua la bâtisse voisine (No. 315) de la sienne, c'est-à-dire

tous les étages au-dessus du premier ou rez-de-chaussée de la bâtisse voisine et appartenant à un nommé Jodoin, et pratiqua dans les murs de division des portes de communication avec ses propres prémisses, faisant du tout un seul et même magasin et manufacture avec ce qui les composait auparavant.

Il ferma et condamna à cet effet toutes issues, ouvertures, etc., existant entre le premier étage ou rez-de-chaussée du No. 315 occupé et loué par un marchand de vins, et les étages supérieurs que lui Rolland avait loués séparément, et arrangea le tout pour qu'on ne pût arriver et avoir accès aux dits étages supérieurs qui formèrent dès lors partie des prémisses de ce dernier, que par la porte d'entrée d'icelles, savoir par la porte du No. 319.

Puis, pour avoir plus d'espace pour manufacturer, il fit des prémisses, telles qu'elles étaient avant cette addition des étages du No. 315, sa manufacture et son bureau, et de ceux-ci, son magasin ou dépôt de chaussures manufacturées, échantillons, etc.

Rolland qui est un homme de haute probité et respectabilité, mais illettré et peu versé dans la loi et ses subtilités, ne se crut pas obligé de notifier l'appelante de ces changements et additions à son établissement, et les choses restèrent dans cette position jusqu'à l'expiration de sa police ou contrat d'assurance, savoir, jusqu'au 16 février 1868, Rolland étant exposé, mais ne s'en doutant pas, à perdre son assurance dans le cas d'un incendie pendant ce temps-là, comme celui qui est venu plus tard consumer entièrement son fonds de commerce, pour la perte duquel il n'a pas encore été indemnisé par aucune des quatre compagnies d'assurance où il était assuré pour différentes sommes respectivement.

Mais par un heureux hazard pour lui, en février 1868, Rolland qui prétendait payer à l'appelante une prime trop élevée pour son assurance qu'il voulait continuer, envoya son commis Laurin au bureau de cette dernière pour faire des représentations à cet effet, menaçant de s'assurer ailleurs si on ne lui faisait pas une réduction sur la prime.

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Laurin s'adressa au gérant (*manager*) de la dite compagnie (l'appelante), savoir, G. B. Muir, qui répondit qu'il ne pouvait rien faire de la sorte sans voir les lieux et constater l'étendue du risque, ajoutant qu'il passerait voir et constater cela et verrait ensuite ce qu'il pourrait faire.

Muir tint parole et passa effectivement le 16 février 1868, au magasin de Rolland. Celui-ci le fit conduire par Laurin au second étage, lui disant (à Laurin) de conduire Muir à Contant, principal employé de la manufacture, et de dire à ce dernier de conduire Muir partout dans l'établissement, et lui faire voir tout ce qu'il y avait à assurer, machineries, marchandises manufacturées et non manufacturées, etc. Laurin conduisit Muir à Contant à qui il transmit, en présence de Muir, ces instructions qui furent suivies à la lettre. Contant conduisit d'abord Muir dans les étages du No. 315 où se trouvait tout le *stock* de chaussures manufacturées qu'il lui fit voir, et le conduisit ensuite dans la manufacture, d'étage en étage et de chambre en chambre ou de département en département. Muir visita et examina le tout, les marchandises à être assurées, les prémisses et la disposition des lieux, et après cet examen minutieux il descendit à l'étage inférieur où se tenait Rolland, à qui il représenta qu'après avoir examiné le tout, la disposition des lieux et l'étendue du risque, il ne pouvait pas le prendre pour une prime moindre que celle que Rolland avait déjà payée, c'est-à-dire $24. Une certaine discussion s'ensuivit entr'eux là-dessus, et comme Muir persistait, Rolland se soumit et donna ordre sur le champ à son teneur de livres Laurin de payer la prime et faire continuer l'assurance en question, ce qui fut fait, sans qu'aucune objection fut faite par rapport à l'addition sus-mentionnée et dans laquelle il avait été transporté le *stock* manufacturé et qui se trouvait auparavant dans les étages supérieurs des Nos. 319 et 317.

Subséquemment, savoir, le 21 mars suivant (1868), un incendie eut lieu dans les prémisses en question, incendie qui, paraîtrait-il, aurait pris naissance dans le No. 315, et tout le fonds de commerce, stock manufacturé, de Rolland fut consumé, ce qui fit souffrir à ce dernier une perte

d'au-delà de $35,000, y compris quelques dommages causés à ses machineries et effets non manufacturés.

Il fit sa réclamation dûment assermentée à l'appelante pour le montant de sa police, savoir, pour le montant du risque pris par elle, $6,000, et, celle-ci s'étant refusée de payer, Rolland institua en recouvrement de cette somme l'action qui donne et a donné lieu au présent appel.

L'appelante a plaidé à cette action les défenses ci-dessus mentionnées et relatées.

Cette contestation a donné lieu au verdict dont nous avons parlé plus haut, et au jugement dont nous avons parlé.

C'est de ce jugement que la défenderesse a interjeté appel, mais nous croyons ce jugement aussi inattaquable que le verdict du jury dans l'espèce.

Les principes suivants ont été maintenus dans cette cause :

1o. Que les contrats d'assurance doivent être interprétés, non par quelqu'erreur ou insuffisance dans la désignation des prémisses mentionnées dans les polices, mais bien d'après ce qu'est évidemment l'intention des parties contractantes.

2o. Que la connaissance de l'agent d'une compagnie d'assurance doit être considérée comme la connaissance de la compagnie elle-même, quant aux effets assurés ou à leur quantité.

Le verdict du jury est conforme à la preuve faite devant lui et à la loi, il est juste et équitable, il n'accorde au demandeur que ce qui est réclamé par son action de l'appelante, qui s'est refusée injustement et sans raisons de payer à Rolland le montant de son assurance, à lui, Rolland, qui était assuré pour $26,000 seulement, aux différentes compagnies d'assurance plus haut mentionnées, et qui a subi une perte de $35,000, dont il n'a pas encore eu un seul denier.

RAMSAY, J. (*for the Court*) :—

This is an action on a policy of insurance for loss by fire. It has already been before us, but since then an

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amendment to the declaration has been allowed, so that the action is no longer the same.

The action originally was on a policy insuring goods in a building, No. 319, St. Paul street. This policy was dated 16th February, 1867, and was numbered 1301; and also, on a renewal of this policy for twelve months longer.

The fire took place during the period covered by the renewal. The claim was for goods destroyed in No. 319. The evidence established that the goods were destroyed, not in No. 319, but in No. 315, premises which were not in the possession of the insured at the time the policy was made, and certainly then formed no portion of the premises insured. The respondent, however, contended that before agreeing to the renewal, the agent of the company saw the premises, and must have seen that the No. 315 formed part of Rolland's premises, and therefore that the declaration that the premises where the damage was done was 319 and not 315, was a totally immaterial variance, for that, in fact, 315 was insured as well as 319. This view seems to have been adopted to some extent by the jury, and completely by the Court of Review. We could not adopt that view, and we granted appellant's motion for a new trial. (1 Leg. News, 604).

The respondent then began to realize his difficulty, and endeavored not to have a new trial, but to have another trial. It is manifest that, strictly speaking, a new trial should not be granted, to allow of a possible amendment; but great latitude is given to the power to amend, and, practically speaking, there is no great reason why the pretentions of parties should not be made more precise before a second trial than before a first. At all events, this Court allowed the second trial, the plaintiff moved to amend, and the defendant acquiesced in the second trial on the issue raised on the amended declaration.

The amendment is very suggestive of the difficulty. It does not even venture to allege a new verbal covenant, but confounds changes and additions, and then goes on to presume an agreement to a new covenant which has never been expressed. Now it appears to me that changes

and additions are not subject to similar rules. A policy to cover No. 1 may continue to do so, although the form of No. 1 be changed by a presumed acquiescence in the change; but how the extent stipulated by the policy can be presumed to be altered so as to cover No. 2, I cannot understand. A strange argument was used, namely, that the risk was not greater if the goods were in several buildings instead of being in one; in fact, that it was less. Now such an argument shows a disregard of the nature of the contract of insurance. To begin with, the contract of insurance is to be interpreted in the strictness of law, exactly like the *cautionnement*. Again, it is a contract against risk; and it is manifest that the risk is less great if specific than if general. The quality or extent of the risk cannot be judged of by the result, but, according to the nature of risks, that is, by the doctrine of chances, on which all insurance is based. Were it otherwise, the insured might say: "I insured my goods in a wooden building, very liable to destruction by fire, but to favor you I moved them into a stone building, with iron shutters, where they were burned; the wooden building still subsists; pay me my loss." This is pretty nearly what happened here; the goods in 319, where the goods were insured, were little injured, while the goods in 315 were almost totally destroyed.

I have said that it is not even alleged in the amendment that there was any agreement, even verbal, to extend the premises covered by the policy; but I go further, and say that it was a condition of the policy, a reasonable and proper condition, that the terms of the policy should not be changed but by an agreement in writing. Thus, then, a verbal change would not be binding.

Again, by law, the terms of the written contract could not be extended by parol, except with a *commencement de preuve par écrit*, of which there is not a trace. But even in the amendment, respondent actually alleges that it was the old policy that was renewed. And furthermore, the only writing between the parties since the policy is the receipt held by respondent, which declares that the policy

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is *continued in force* for twelve months. But, jumping over all these difficulties and coming to verbal evidence, we have it proved that Mr. Muir, far from intending to extend the risk of policy 1031, said he would not take it, and that he only continued it because it was already taken.

The case of *Wyld* v. *The Liverpool & London Ins. Co.* (1) was insisted on; but the principle there laid down does not affect this case at all. What was there held is perfectly reasonable—if there be a misdescription and this is properly proved, the insured may recover for damage suffered in the premises included in the proper description. But that is not the case here. Rolland could not have intended to insure 315 when he took the policy 1031, for he had not his goods in these premises at the time, and indeed he had not the premises at all.

Another objection is made—one of procedure. It is said appellant should not have moved for judgment on the verdict but for a new trial.

On the previous trial he moved for a new trial. I think, strictly speaking, he need not have done so, and if he had not, perhaps he would have been saved some expense and trouble. The jury found there a matter of law, and found it wrongly; but the law was in such close connection with the fact that, as a matter of precaution, appellant made the two motions. He would have been very unwise to have done so here, for the jury fully answered the whole question, and found the fact nakedly, so the Court had only to apply the law. The law to be applied seems to me to be perfectly clear, that Mr. Muir seeing the door into No. 315 did not amount to a covenant to extend a policy over other premises than the premises in question.

Now, to put the point practically, suppose the fire had destroyed the premises before the expiry of the time specified in the policy, but subsequently to Muir's visit, could the company be held liable? I think no sane man

(1) 1 Can. S. C. Rep. 604.

could pretend that it would. Then, where is the contract to bind the company now ?

We are to reverse the judgment of the Court of Review.

The judgment in appeal is as follows :—

" The Court, etc.....

" Considering that by the policy of insurance on which this action was instituted, the company appellant only agreed to insure the stock of goods mentioned in the premises No. 319, St. Paul street of the city of Montreal ;

" And considering that the respondent has not by his subsequent amendment alleged, nor has he proved, that any subsequent insurance was effected on the stock of goods belonging to the original plaintiff in this cause, which were in the premises No. 315, St. Paul street, Montreal, and that the jury has not by its verdict declared that the stock of goods in said premises, No. 315, was insured by the said company appellant ;

" And considering that under the circumstances of this case the respondent was not entitled to recover more than the amount tendered by the company appellant, for damages to the goods and merchandises which were in the premises No. 319 at the time of the fire, and that there is error in the judgment rendered by the Superior Court sitting in Review at Montreal, on the 29th of April, 1881 ;

" This Court doth quash and annul the said judgment of the 29th of April, 1881, and proceeding to render the judgment which the said Superior Court should have rendered, doth declare the tender made by the said company appellant of the sum of $260 deposited in the Superior Court of the district of Montreal, good and valid, and doth dismiss the action of the said respondent for any sum above the said sum of $260 ; and this Court doth condemn the said respondent in his said capacity, to pay to the appellants the costs incurred as well in the Court below as on the present appeal, the said costs to be paid in part or in full as the case may be, out of the said sum of $260, and the surplus, if any, to be paid to the said respondent in his said capacity ; and on payment of the

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said sum as above ordered, the prothonotary of the Superior Court of the district of Montreal, shall be duly discharged."

Judgment reversed.

Abbott, Tait & Abbotts, attorneys for appellants.
Archambault & David, attorneys for respondent.
(J. K.)

May 27, 1882.

Coram DORION, Ch. J., MONK, RAMSAY, CROSS, BABY, JJ.

THE NEW YORK CENTRAL SLEEPING CAR CO.,

(*Defendant in Court below*),

APPELLANT;

AND

PETER DONOVAN,

(*Plaintiff in Court below*),

RESPONDENT.

Foreign Corporation—Action against—Service—Arts. 34, 49, 64, *C.C.P.—Cause of action.*

HELD:—That a corporation whose principal place of business is in a foreign country, may be served with process at any place in the Province of Quebec where it has an office for the transaction of business. So, where a foreign corporation had an office at Montreal, for the sale of sleeping car tickets, and the plaintiff, who had bought a ticket from the defendants at New York, for a sleeping-car berth from that city to Montreal, brought an action of damages, alleging that he had been unlawfully expelled from the sleeping car, it was held that the service of his action at the office of the Company in Montreal, was a sufficient service to give the Court at Montreal jurisdiction. Further, that although the expulsion took place beyond the province line, yet as it continued until the plaintiff reached Montreal, (he being forced to ride in a first class car), the cause of action arose in this province.

The appeal was from two interlocutory judgments of the Superior Court, Montreal (TORRANCE, J.), the first,

March 31, 1881, dismissing an exception to the form, and the second, April 11, 1881, dismissing a declinatory exception.

The judgment dismissing the exception was as follows:—

"The Court having heard the parties by their counsel upon the merits of the *exception à la forme* made and filed by defendant in the present cause, etc.

"Seeing that by the Consolidated Statutes of Lower Canada, chap. 91, sec. 3, in whatever place in Lower Canada a foreign corporation or company has an office or agent for the transaction of business, such corporation may be impleaded in Lower Canada, and service of any process at such office, or on such agent in Lower Canada, where the action is brought, of such corporation or company, shall be a good service;

"Considering that W. B. Viall, upon whom the writ and declaration in this cause were served, sold tickets such as that upon which plaintiff bases the contract, and for breach of which plaintiff brings his action, and said Wm. B. Viall was agent of defendants for the transaction of their business in Montreal, and the office where said service was made was the office of the company, defendants, for the sale of such tickets;

"Doth maintain plaintiff's answer to said *exception à la forme* of defendants, and dismiss said exception with costs, *distraits*, etc."

The judgment dismissing the declinatory exception was as follows:—

"The Court having heard the parties by their respective counsel upon the *exception déclinatoire*, filed by defendants in this cause, etc.

"Seeing that by the Consolidated Statutes of Lower Canada, chap. 91, sec. 3, in whatever place in Lower Canada a foreign corporation or company has an office or agent for the transaction of business, such corporation may be impleaded in Lower Canada and service of any process at such office, or any such agent in Lower Canada, where the action is brought, of such corporation or company, shall be a good service;

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"Considering that William B. Viall, upon whom the writ and declaration in this cause was served, sold tickets such as that upon which plaintiff bases the contract, for breach of which the plaintiff brings his action, and said Viall was agent of the defendants for the transaction of their business in Montreal, and the office where said service was made was the office of the company for the sale of such tickets;

"Doth maintain plaintiff's answer to the *exception déclinatoire* of defendants, and dismiss said exception with costs, *distraits*, etc."

May 17, 1882.]

J. S. Hall, for the appellants:—

Articles 61, 63 and 64 of the Code of Procedure, regulate the mode of service, providing there is jurisdiction under Article 34 and subsequent ones of the same Code.

Article 34 requires, in order to confer jurisdiction, the defendant to be summoned before—(1). The Court of his domicile; (2). Before the Court of the place where he is served personally; or (3). Before the Court of the place where right of action originated.

The appellants have not been summoned before the Court of their domicile. The writ does not show where their domicile or principal place of business is. It is subsequently shown by the evidence to be in the City of New York, U. S.

The Company have not been summoned where the right of action originated. The declaration clearly recites the whole of the contract to have been entered into in the City of New York. The ticket in question was purchased at the head office there. Further, any breach, ejectment, or complaint of respondent arose in the State of New York. It was in that State he had to leave the car of appellants, and in that State, or in the City of New York, the right of action originated.

As to the other condition conferring jurisdiction, viz.: personal service, none has been fulfilled. A corporation

cannot be served personally, and even admitting possibility of analogous service, none has been effected here.

Article 61 C. C. P. requires service on a Company to be made at its office, or elsewhere upon its President, Secretary or Agent, and Article 64 permits foreign corporations, who have an agent or an office in Lower Canada, to carry on business there when served in the manner indicated in Article 61.

It is then under provisions of Articles 61 and 64, regulated by Article 34 conferring jurisdiction, that appellants can be summoned.

If the cause of action did not arise in the City of Montreal, or through the office, or agent, or place where the foreign corporation carried on business, then no jurisdiction is conferred. The law and the provisions thereof which allow the suing of a foreign corporation within this Province are very exceptionable and restrictive. It can only apply to acts or contracts made within such Province, and in no case can it apply to, or can an action be maintained against a foreign corporation for an act or breach of a contract arising, committed, or taking place outside such Province and jurisdiction.

Supposing Viall to be an agent and the office of the Central Vermont Railway to be an office of appellants, the cause of action did not arise through any dealing with him or that office. There is, therefore, no jurisdiction and the service is bad. If it were otherwise, on the same principle service might be validly made upon appellants at the Windsor Hotel, or the other offices named above, or at Quebec, or many of the other places in Canada, where the travelling community may secure tickets for berths on appellants' cars.

On the whole case, appellants submit there can be no doubt as to their two exceptions being well founded; and to summarize, for the following reasons:

1. Incomplete description, and their principal place of business not being indicated.

2. W. B. Viall was never their secretary or agent, expressly or impliedly, and they never countenanced him as such.

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3. That if he ever made any representation as such, it was without their knowledge or consent.

4. That he never could be construed to be an agent upon whom service of process could be made for any transaction; much less for a transaction outside his own possible sphere, or limits, and of which he knew nothing.

5. That for similar reasons, the office in question was not an office of the appellants.

6. That the Court here has no jurisdiction, none of the conditions of Article 34 of the C. C. P. existing.

J. J. Curran, Q. C., for the respondent:—

The respondent will firstly deal with the *exception déclinatoire*. The objection of the appellants is devoid of all foundation, for apart from the reasons set forth in the *motivé* of Mr. Justice Torrance, in which he refers to Consolidated Statutes of Lower Canada, cap. 91, sec. 3, pointing out that the appellants have an agent and an agency in this district, and are therefore amenable to our Courts, the allegations of the respondent's declaration make it manifest that the Court in this Province has jurisdiction. The contract was made, it is true, in the City of New York, in the State of New York, but it was a contract the operation of which extended from New York to the City of Montreal, in the Province of Quebec. The respondent was ejected from the car in the State of New York, but, contrary to the terms of his agreement, he was kept out of his just right to his berth, not merely in the State of New York, but from the boundary line of the Dominion all the way through the Province of Quebec and into the City of Montreal. The allegation of the plaintiff's declaration is that "*he had to travel all the way to the City of Montreal*," etc. This branch of the case is too patent to require consideration or argument.

As to the proper designation of the appellants on the writ and declaration, the description given is as follows:—

"The New York Central Sleeping Car Company, a body "politic and corporate under the laws of the State of New "York, one of the United States of America, and having

" an agency and place of business in the City of Montreal, " in the District of Montreal."

The appellants complain that the principal place of business of their foreign corporation is not mentioned. This is not necessary according to our law. That which is necessary is to allege that the Company has an office or place of business here in order to give our Courts jurisdiction, but it would be absurd to suppose that the plaintiff in any suit should be unable to proceed with his demand until he had discovered in which of, perhaps, fifty cities and towns a foreign body held their principal place of business. The respondent has set forth in what State of the neighbouring Republic the appellants have acquired their rights as a corporation, and having also alleged that they are carrying on business in the district of Montreal, in the Province of Quebec, nothing more was required; whether the principal place of business of the appellants is New York, Albany or Troy, a matter of which the respondent could not by any means be certain, is of no consequence; but that they have a place of business here undoubtedly is.

The respondent contends that the appellants have had due notice of this action; that it was legally served on the agent of the Company, who transmitted the papers to appellants forthwith on their reception; that William B. Viall is the agent of the Company; that his office is their place of business in the City of Montreal; that the Court below has full jurisdiction over the matter in issue in this cause, and that the judgments of Mr. Justice Torrance, dismissing appellants' exceptions, declinatory and to the form, ought to be confirmed.

RAMSAY, J.:—

This is an action of damages by a passenger in a sleeping car, from New York to Montreal, who was ejected from the berth he had taken and paid for, without excuse, and forced to ride in a first-class car to Montreal.

The action is met by two preliminary pleas, one to the form, the other dilatory. The first says that the descrip-

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tion of the Company defendant is insufficient, because it is not said in the action where its principal place of business is. The appellant relies on Art. 49, C. C. P. This Article is not conclusive; it only says what shall be sufficient. But I do not see that it is necessary to allege this.

The second pretension is that the service on Mr. Viall, the agent who sells tickets here, is insufficient, and the question has been raised whether Mr. Viall was an agent. It is proved that he sells tickets like that sold to respondent. He has an office in Montreal, and is publicly advertised as their agent. He also offered to get back the respondent's money for him, when he heard of the difficulty. Upon the whole, this Court is not disposed to disturb the judgment which held the proof of agency sufficient.

But, it is said, the plaintiff could not sue here, because the whole cause of action did not arise here. But the whole cause of action, so far as our Courts are concerned, happened here. The plaintiff had to travel from the province line to Montreal, without the accommodation he bought and paid for.

Again, it is urged that the defendant should have been brought in by advertisement. Not if the Company has a domicile here. We constantly see foreign companies summoned at their place of business here.

Judgment confirmed.

Church, Chapleau, Hall & Atwater, attorneys for appellants.

J. J. Curran, Q. C., attorney for respondent.

(J. K.)

November 20, 1882.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

ZÉPHIRIN BLOUIN,
(*Plaintiff in Court below*),
APPELLANT;

AND

NORBERT BRUNELLE,
(*Defendant in Court below*),
RESPONDENT.

Fraud—Person purchasing property of relative and agreeing to pay his debts—Composition with creditor ignorant of such purchase.

HELD:—That a person who buys the property of his brother-in-law in order to assist him, agreeing to pay his debts (which exceed the value of the property), may licitly contract with a creditor, who does not know of the sale, to take less than the face value of the debt,—more especially where the creditor had previously endeavored to sell the debt at such reduced amount, and the transaction is advantageous to him.

The appeal was from a judgment of the Circuit Court, Sherbrooke, April 30, 1881, which was in the following terms:—

"The Court, etc.....

"Considering that plaintiff hath failed to prove the material allegations of his declaration in this cause, and more particularly that the judgment on which this action is based, to wit: the judgment against François Scott, declared upon, was recovered by plaintiff for any cause, consideration or claim for which defendant ever was or became liable;

"And considering that plaintiff hath not produced the promissory note set up by way of inducement in his said action, or in any wise shown or proved that the judgment so sued upon is connected with, or relates to, said note, or that said judgment is the result of any debt or liability

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of said Scott, which defendant ever made himself liable for or undertook to pay, and that there is no proof to connect said judgment with the note or notes specified in the deed of sale from said Scott to defendant, which were and are the only liabilities of said Scott which defendant ever undertook to pay;

"And considering that plaintiff hath made no proof of any action by him as alleged, resulting in a judgment against said Scott, and that said judgment does not show in or for what cause of action it hath been recovered;

"Considering, therefore, that plaintiff hath wholly failed to show defendant liable for the amount of said judgment on which this action is solely and immediately based, and that he hath not sued upon, or ever produced, the alleged note so referred to by way of inducement to this action, nor established defendant's liability under said judgment, dismissing defendant's exception for want of proof, doth dismiss this action;

"But considering that defendant hath, as shown by his own deposition in this cause, acted in bad faith in his dealings with plaintiff, in respect of his relations with said Scott, this action is dismissed without costs."

Sept. 22, 1882.]

L. C. Bélanger, for the appellant.

Panneton, for the respondent.

RAMSAY, J.:—

I am to confirm. The pretention of appellant appears to me to be untenable. It is this: One Scott was indebted to appellant and to many others, so as to be utterly insolvent, and time only made matters worse. The further he went the more deeply he became involved. He left Canada to live at Lewiston, in the United States, owing $200 and he came back owing more than $400. To meet these debts he had a small farm that no one would buy, for fear of being evicted by the unpaid creditors, and that no creditor could sell owing to the expenses of a judicial sale. Appellant had said he would take fifty cents on the dollar, or something to that purpose, and Scott's

brother-in-law bought the land, promised Scott to pay his debts, and took him and his family to live with them almost as a charity. He then went to Lewiston, saw appellant, and offered him fifty cents on the dollar, without telling him that he had purchased Scott's land and promised to pay his debts. Appellant took the money, grumbling at the loss, and respondent added $5, telling him that he had offered the debt for the same rate with delay. The appellant then gave a receipt for the whole debt. Subsequently, he discovered the bargain between Scott and respondent, and he now says: "My debtor was "insolvent and could not pay, but you undertook to pay "his debt, and you are solvent; therefore when I settled "I had my action against you, on the principle that the "creditor may exercise the rights of action of his insolvent "debtor." This is very true, but when the appellant sued respondent, what action had he against Scott? None; he had taken from him all his debt was worth, and the bargain between Scott and respondent was *res inter alios*, and could have been abandoned by them at any moment. Nor was was there any fraud, for it is plainly shown that the land was not worth more than half of the debts without costs.

There is a rule of the civil law which it is well to bear in mind, that one is not allowed to enrich oneself at the expense of one's neighbour.

TESSIER, J.:—

En 1873, un nommé François Scott demeurait et possédait, dans le canton de Weedon, près de Sherbrooke, une terre de la valeur de $200 à $300. Il se trouvait endetté, d'une somme à peu près égale, entr'autres d'une obligation hypothécaire de $113 à Charles Tanguay, du même lieu.

Dans le dessein de gagner de l'argent pour dégrever sa terre de l'hypothèque et payer ses dettes, il émigra à Lewiston, dans l'État du Maine, où il séjourna deux ans, mais à la fin de ce temps il se trouva avec $200 de plus

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de dettes contractées à Lewiston. Parmi ces dernières dettes se trouvait celle de l'appelant Norbert Blouin, résidant à Lewiston, consistant en deux billets, l'un de $112, l'autre de $60, en tout $172.

François Scott retourna alors au Canada sur sa terre à Weedon, qui n'avait pas augmenté en valeur. Son créancier Blouin, voyant qu'il était en grand danger de perdre sa créance, l'offrit à un nommé Fontaine pour moitié, et le chargea même, d'après le témoignage de Fontaine, d'obtenir ce montant réduit. Cependant l'affaire ne se réglant pas, Blouin chargea M. Bélanger, avocat de Sherbrooke, de collecter ce montant.

Norbert Brunelle, l'intimé en cette cause, beau-frère du nommé François Scott, sur les conseils de Fontaine et sa promesse qu'il aurait une déduction de moitié du créancier Blouin, acheta la terre de François Scott, à la charge de payer ses dettes qui excédaient la valeur de la terre. C'était en apparence pour rendre service à Scott, qui était âgé, peu capable de travailler et chargé d'une famille.

Brunelle s'est de suite rendu avec Fontaine à Lewiston, et sans informer Blouin qu'il avait acheté la terre de Scott à la charge de payer ses dettes, il a transigé avec lui en obtenant la déduction de moitié sur sa dette et, moyennant $85, il a obtenu une quittance pour le montant des deux billets, qui était de $172.

Blouin, apprenant plus tard que Brunelle avait acheté la terre de Scott à la charge de payer ses dettes, a cru voir un dol dans la conduite de Brunelle, et que ce dol lui permettait de réclamer la moitié de la réclamation, à laquelle il avait ainsi renoncé. Il a commencé par poursuivre Scott, mais n'obtenant rien de lui, il a poursuivi Brunelle, et la Cour à Sherbrooke a débouté son action ; c'est de ce jugement qu'il y a appel.

Le jugement adopte pour motif qu'il n'y a pas de preuve de l'identité de la créance de Blouin. Sur ce point la preuve n'est pas la meilleure qui eût pu être donnée. Mais à un autre point de vue, il n'y a pas de dol prouvé. Le défendeur intimé, Brunelle, a payé pour la terre de

Scott, même avec la déduction qu'il a obtenue, plus que la vraie valeur de cette terre.

Il est clairement établi que si la terre de Scott eût été décrétée — c'était le seul bien qu'il avait — le créancier Blouin n'aurait pas reçu la moitié de sa créance, et aurait tout perdu.

Il est en preuve que le seul motif de Brunelle était de secourir son beau-frère Scott, qui lui serait tombé à ses charges avec sa famille, si la terre eût été vendue en justice.

Il n'y a donc eu ni aucun préjudice fait au créancier Blouin par Brunelle, qui lui a payé plus que la vraie valeur de sa créance. Il est bon de remarquer, qu'il n'y avait pas de lien de droit entre le créancier Blouin et l'acquéreur Brunelle, et que si Blouin eût refusé de faire cette déduction, il était libre à Brunelle et Scott de résilier leur acte, et Blouin n'aurait eu en ce cas aucun recours contre Brunelle.

Par conséquent on ne peut en venir à une autre conclusion que celle de confirmer ce jugement avec dépens.

Judgment confirmed.

L. C. Bélanger, attorney for appellant.

Hall, White & Panneton, attorneys for respondent.

(J. K.)

November 24, 1884.

Coram DORION, CH. J., MONK, RAMSAY, TESSIER, BABY, JJ.

LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL & SOREL,

(*Defendant in Court below*),

APPELLANT;

AND

PIERRE VINCENT ET AL.,

(*Plaintiffs in Court below*),

RESPONDENTS.

Jurisdiction—Appeal—Non-appealable cases consolidated with appealable case—Arbitration—Fees of Counsel—Quebec Consolidated Railway Act, 43-44 *Vic.*, *c.* 43, *s.* 9.

HELD:—1. Where several non-appealable actions in the Circuit Court are consolidated with one that is appealable, as involving the same question, the whole will be adjudicated, on an appeal in the principal case.

2. A Judge of the Superior Court may, in his discretion, allow fees to counsel on an arbitration to fix the indemnity to be paid for lands taken by a railway company, conducted under the provisions of the Quebec Consolidated Railway Act, 43-44 Vic., c. 43, s. 9; and there is no power in the Court to revise such taxation.

The appeal was from a judgment of the Superior Court, Montreal (JETTÉ, J.), Feb. 28, 1883, in the following terms:—

"La Cour, etc.....

"Considérant que la demande a pour objet le recouvrement des frais encourus par le demandeur sur un arbitrage convenu entre lui et la défenderesse, en décembre 1881, au sujet de l'indemnité à payer par cette dernière au dit demandeur, pour un terrain dont la compagnie défenderesse avait besoin pour sa voie ferrée, lesquels frais ont été taxés conformément aux dispositions de l'acte des chemins de fer (43-44 Vic., c. 43) à la somme de $230, et que le dit

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demandeur réclame maintenant de la dite compagnie et de l'autre défendeur de Grosbois, entre les mains duquel la défenderesse a déposé une somme suffisante pour payer les dits frais, et qui, en conséquence, s'y est obligé;

"Considérant que le dit défendeur De Grosbois a déclaré s'en rapporter à justice, mais que la compagnie défenderesse conteste la demande incidente disant:

1o. Que les frais réclamés sont ceux des avocats du demandeur, et qu'en loi la défenderesse n'est pas responsable de ces frais qui ne peuvent être taxés contre elle; les seuls frais dont elle soit tenue étant ceux des arbitres et les déboursés par eux faits, et qu'en conséquence la taxe des dits frais par le juge contre la défenderesse est illégale et nulle;

2o. Que d'après l'acte des chemins de fer, les avocats du demandeur ne pouvaient pas réclamer ces frais de la défenderesse; que d'ailleurs les dits avocats n'ont pas prouvé devant le juge qui a taxé les dits frais les services par eux allégués; que leur demande était exagérée et exorbitante; qu'il n'existe aucun tarif pour tels frais, et que la taxe d'iceux n'est pas sujette à révision, et que le jugement rendu sur la dite taxe n'est pas exécutoire et est illégal, nul et de nul effet, et qu'en conséquence la défenderesse est en droit de faire déclarer la dite taxe non avenue quant à elle;

"Considérant que le demandeur a répondu *en droit* à ces deux exceptions, soutenant en substance que cette Cour n'a pas juridiction pour réviser le jugement rendu par le premier juge sur la taxe des dits frais, et que cette taxe constitue chose jugée entre les parties;

"Considérant que la loi réglant les cas d'arbitrage pour l'expropriation des terrains, requis pour la construction des chemins de fer, prononce d'abord elle-même la responsabilité de la partie dont la prétention n'a pas été soutenue par la sentence arbitrale quant au payement des frais encourus sur telle arbitrage, puis attribue au juge le pouvoir de déterminer le montant de ces frais contre telle partie;

"Considérant que rien dans cette loi ne s'oppose à ce

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que le juge, dans l'exercice du pouvoir qui lui est ainsi confié, accorde des honoraires aux avocats qui ont représenté la partie en faveur de qui les frais sont taxés, et qu'en principe même ce pouvoir est inhérent à l'exercice de la discrétion attribuée au juge en tel cas ;

" Considérant que bien que la taxe ainsi prononcée ne soit pas exécutoire, aucun pouvoir de révision d'icelle n'est cependant accordée par la loi ;

" Vu les paragraphes 20 et 38 de l'article 9 de la loi 43-44 Vic., c. 43 ;

" Considérant qu'il appert aux écritures des parties dans l'espèce que la taxe des frais réclamés par le demandeur a été prononcé par le premier juge, après avoir entendu les parties contradictoirement sur les mêmes moyens que ceux invoqués maintenant à l'encontre de la demande, et qu'il y a chose jugée entre elles sur la question soumise ;

" Considérant en conséquence que cette Cour est sans pouvoir pour réviser le dit jugement ;

" Renvoie les exceptions et défense de la défenderesse, et la condamne à payer au demandeur la dite somme de $230, montant des frais taxés en sa faveur comme susdit, avec intérêt sur icelle du 18 août 1882, jour d'assignation, et les dépens distraits, etc. ; et condamne le dit défendeur De Grosbois, et lui enjoint de payer au dit demandeur sur et à même les deniers qu'il a en mains appartenant à la défenderesse la dite somme de $230 courant, ainsi que les intérêts et frais tel que susdit, mais sans frais quant à lui dit De Grosbois."

Sept. 18, 1884.]

W. H. Kerr, *Q. C.*, for the appellant :—

The present appeal is from a judgment condemning the appellant to pay respondent, Vincent, the sum of $230, interest and costs ; and also from the judgments rendered in the nine other cases on the same day for $46 each, which suits were united to and consolidated with, the suit of the respondent, Vincent.

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The respondent, Vincent, instituted an action in the Superior Court, at Montreal, on the 27th August, 1882, against the appellant to recover the above sum, and by his declaration alleged in substance: That by an arbitration bond passed before Kittson, notary, on the 7th Dec., 1881, it was agreed by the respondents, parties to the said deed, acting by R. Prefontaine, Esq., advocate, and the appellant; that an arbitration should take place according to the provisions of the Railway Act of the Province of Quebec, to determine and establish the value of certain lands to be expropriated by the appellant, and to fix the damages payable by appellant to respondents by reason of the taking of certain portions of the said lands belonging to said parties for the purposes of the railway of the said appellant.

That Thomas Boucher de Grosbois was arbitrator for appellant, Antoine Rocheleau was arbitrator for respondent and the other proprietors, and Alfred Williams was third arbitrator, and that the award should be made on or before the 31st January, 1882.

That the appellant's offer for the land to be taken from the respondents was at the rate of $200 per arpent in superficies, and that by law if the appellant was, by the award to be made, condemned to pay respondents more than $200 the costs of arbitration should be payable by the appellant.

That as security for the amount to be awarded to the respondent and the other proprietors, the sum of $3,200 was deposited in the hands of the said Thomas Boucher de Grosbois (who is a party, defendant, in the present suit, but who has declared that he submits himself to the decision of the Court.)

That the arbitration was held, and by the award made on the 4th January, 1882, by deed before Kittson, notary, the respondent, Vincent, was allowed $236.50, which sum was more than the amount offered to him by the appellant, and by reason thereof the appellant was made liable for all the costs of arbitration.

That the costs taxed against the appellant in favor of

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the respondent for *disbursements*, *costs* and *fees gagnés* by the advocates and attorneys of the respondent, representing the respondent at the said arbitration, Messrs. Préfontaine & Major, amount to $230.

That respondent has settled with his advocates and attorneys for said costs, which gives him the right to be reimbursed and paid said sum.

That the costs incurred in putting the appellant *en demeure* to pay, amount to $5 which, under the circumstances, respondent, Vincent, is entitled to recover.

Then follows a prayer for judgment for $235, and that the defendant, Thomas Boucher de Grosbois be ordered to pay said sum from out of the moneys in his hands belonging to the appellant.

The appellant pleaded firstly, that true it was it had entered into the arbitration bond set out in the respondent's declaration which was with respondent and nine or ten others, and that the amount of compensation awarded exceeded the amount offered.

That with respect to the costs claimed by the respondent, appellant was not liable for the same, the said costs not being taxable by law against the appellant, the costs payable by appellant under the arbitration bond merely being the fees of the arbitrators and disbursements by them made.

That by law no costs could be taxed in favor of Messrs. Prefontaine & Major against the appellant, and that the taxing of the bill of costs by Mr. Justice Rainville, as against said appellant, is illegal.

By the second plea the appellant alleged that Messrs. Prefontaine & Major, on the 15th April, 1882, presented a bill of costs against the appellant for taxation, to Mr. Justice Rainville who, on the 3rd May, 1882, taxed the same at $644, that the said costs were claimed for fees for the arbitration set out in respondent's declaration between the appellant and the said respondent and others.

That at the time of presenting the said bill of costs the appellant contended that it was not liable for any costs in favor of the said Messrs. Prefontaine & Major, and

that the Judge could not tax the same against the appellant.

That by the Consolidated Railway Act of the Province of Quebec, 43-44 Vict., c. 43, the only costs payable under the arbitration by the appellant would be costs of arbitrators and the disbursements by them made.

That under said Act Messrs. Prefontaine & Major could not claim any costs against the appellant.

That in any case the services alleged to have been rendered by the said Messrs. Prefontaine & Major were never proved, and were exaggerated and exorbitant and far beyond what they were entitled to.

That no proof was ever made before Mr. Justice Rainville of said services.

That no tariff is in existence for the taxation of said costs, that no means exist for the revision of said taxation, and the judgment on said taxation is not executory against said company, and is illegal, null and void.

That the appellant is not bound by said taxation and has the right to have the same set aside as against appellant.

That Messrs. Préfontaine & Major never did render the services by them alleged, and the same are fictitious, and that appellant is not liable either to Messrs. Prefontaine & Major, or to the respondents for said costs or any part or portion of the same.

The appellant prayed that the taxation of said costs, so far as the appellant was concerned, be declared illegal, null and void, and appellant declared not liable for said costs or any portion of the same, and that the respondents' action be dismissed with costs.

Then followed a *défense au fond en fait.*

The respondents answered in law the two first pleas of the appellant and prayed for their dismissal.

Because by said pleas they attacked a judgment of one of the Judges of the Superior Court, and that said judgment was not susceptible of revision or appeal.

Because the said pleas sought to annul or revise a judgment of a Judge of the Superior Court legally and regularly pronounced.

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Because appellant cannot attack a judgment pronounced according to law by means of a defence denying to the respondent rights given to him by a judgment pronounced after the parties had been heard.

Because by obtaining the conclusions of its pleas the appellant would obtain a revision of a judgment which is not susceptible of being annulled in this way.

Because by the pleas appellant contends it is not responsible for costs of arbitration, which by judgment were taxed against the appellant.

Because appellant by means of a plea cannot contend against a judgment regularly pronounced, and that appellant has not the right to attack the judgment of the 3rd May, 1882, as illegal, null and void.

Because the pleas cannot be maintained by the Superior Court which has no jurisdiction to take cognizance of the legality or illegality of the judgment of 3rd May, 1882.

Issue being joined the parties went to proof.

The respondent produced a witness, Mr. J. Lambert, to prove the payment of Messrs. Prefontaine & Major's bill by respondent.

Nine cases were instituted in the Circuit Court, Montreal, in the names of the other proprietors who were parties to the arbitration—each suit being for $51 costs taxed by Mr. Justice Rainville under the same bill as sued for in the present case. A motion was made in the Circuit Court to consolidate these cases, and to remit them to the Superior Court to be joined to the present case, the causes of action being the same and the defence to the said actions being alike, which motion was granted by cousent. Another motion was made in the Superior Court to unite and consolidate all the cases, and this likewise was granted by consent.

It will therefore be seen that the questions to be decided by this Court are :—

1. Whether under the Quebec Consolidated Railway Act, 43-44 Vic., c. 43—the appellant is liable for the fees of the respondent's attorneys, and whether such fees form part of the costs of arbitration.

2. Whether the appellant had the right to plead the illegality of the taxation of the costs against appellant by Mr. Justice Rainville.

Before discussing these questions it may be well to take up the petition made by respondent in this Court on the 15th May, 1883, to dismiss the appeal so far as the suits taken in the Circuit Court are concerned, which suits were joined to the present one in the Superior Court.

It is submitted that the respondents cannot complain of their being joined in the present appeal inasmuch as they consented that their suits should be joined to that of the respondent Vincent—and that the judgment in said suit should decide the others ; being consolidated in the Circuit Court, and then joined to the suit of the respondent Vincent, in the Superior Court, the ten suits formed united but one, just in the same manner as if the respondents had all joined in one suit as plaintiffs. All the suits being united the learned judge, in lieu of rendering judgment in every case, should have rendered judgment in but one, referring in his judgment to the fact of their being united,—moreover, the suits being united in the Circuit Court and joined to the suit of Vincent in the Superior Court, the judgment became susceptible of appeal ; had not the appellant included all the respondents in the appeal, the respondent Vincent would have complained that the others had not been made parties. It is to be borne in mind that there was but one arbitration bond for all the parties and but one award, which fixed the amounts to be paid to each proprietor.

Coming to the merits of the present appeal and taking up the first question, it is submitted that the appellant is not liable for any fees to the attorneys of the respondents. The respondents rely upon sub-sec. 20, of sec. 9, of the Quebec Consolidated Railway Act, 1880, c. 43, (43-44 Vic., Quebec) which is in the following words :—

" If, in any case where three arbitrators have been ap-
" pointed, the sum awarded be not greater than that
" offered, the costs of the arbitration shall be borne by the

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" opposite party, and be deducted from the compensation; " but if otherwise they shall be borne by the Company; " and in either case, they may, if not agreed upon, be " taxed by the judge, upon a petition to that effect, duly " served upon the adverse party at least two days before- " hand, with a copy of the bill of costs, in detail."

The respondents contend that under this section they have the right to recover from appellant the fees which their attorneys may have charged them; but it is submitted by appellant that the costs referred to in the section in question, are only the fees of arbitrators, tax of witnesses, and the cost of the arbitration bond and of the award. If the respondents thought proper to employ attorneys and counsel they did so at their own cost, and cannot saddle the fees which their attorneys or counsel might think proper to charge.

In the first place it was quite unnecessary that either of the parties should be represented by counsel before the arbitrators. The question which the arbitrators had to decide was not one of law, but one of fact, namely, the amount of compensation to be paid by the appellant for the value of the land taken, or the damage caused by reason of the work.

The ten proprietors who joined in the arbitration and who are the respondents in the present appeal, were represented by Mr. R. Prefontaine in the bond as their attorney, but not as their attorney *ad litem*. The bond itself does not state that either party to it should be represented by counsel or by attorney, but provided that a sum of $3,200 should be deposited to cover the amount of costs should costs be awarded against the Company, and the amount to be awarded to said parties; the award provided that the costs of arbitration should be borne by appellant; but no reference either in the arbitration bond or in the award is made as to either attorneys' or counsel fees. The arbitrator's costs were taxed by Mr. Justice Mackay, each being awarded $147 in lieu of $531, which they each demanded. The Company, appellant, had offered each proprietor $200 per arpent, but this amount

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was increased by the arbitrators, the total award for the ten proprietors amounting to $2,200.19.

The Railway Act above cited does not in any way refer to attorneys' fees—no tariff for such fees has been fixed: and no reference whatsoever is to be found in the Act giving authority to the judges to make such a tariff; had the legislature intended that the attorneys' fees in an arbitration under the Act should form part of the costs of such arbitration, it surely would have been so stated.

Moreover, upon reference to sub-sect. 28, of sect. 9 of the Act, it will be seen that the Company has the right to obtain possession of lands, etc., upon depositing in Court the amount awarded by arbitrators, but not one word is said with reference to fees to the attorneys which proprietors may think proper to employ: and it is a fair presumption that the arbitrators in making their award will allow a sum sufficient to cover any legal charges which the proprietors may incur.

Take the case of municipal expropriations in the city of Montreal or in this Province, though proprietors may be represented by counsel, they have nevertheless no right to charge or collect from the corporation such charges; the expropriation commissioners who are really arbitrators fix the amount of compensation, and if this be not accepted, the proprietor has then to exercise his recourse.

Our Superior or Circuit Court tariffs make no provision for fees to counsel or attorneys in proceedings before arbitrators, even in cases where a suit is sent to arbitrators, experts or *praticiens* by an interlocutory judgment.

In England the mode of assessing compensation for lands taken—is 1. By Justices of the Peace. 2. By Surveyors. 3. By Arbitration. 4. By a Jury. Hodges on Railways, 6th Ed. p. 249.

The proceedings regarding an arbitration under the English Statutes, are different from the proceedings under our law; in England the submission to arbitration is usually made a rule of Court, and there is a provision in the English Statute allowing this to be done upon appli-

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cation of either party. Hodges—Railways, p. 258. No such provision is found in our law.

It will be contended, no doubt, by the respondents that in England counsel fees are taxed against the Company, but upon reference to the section of the English Statute by which costs are taxed, it will be seen that the wording is entirely different from ours. Hodges—Railways, p. 258, also, p. 770.

In England "all the costs of any such arbitration, and incident thereto" are to be borne by the promoters unless the arbitrators award the same or a less sum than offered by the promoters—in which case each party bears his own costs incident to the arbitration, and the arbitrator's costs are borne in equal proportions.

In the Court below the repondents' counsel referred to Hodges on Railways, 6th edition, pages 292-293, as authority for taxing of counsel fees, but upon reference to the cases cited there, it will be seen that the proceedings in these were before a Jury—and even in these cases the costs were not taxed as between attorney and client but between party and party.

It is perfectly clear that in France—where parties to an arbitration employ attorneys, they cannot include the fees of such in the costs of arbitration. The appellant refers to Mongalvy on Arbitration, § 364, p. 241, also, note 2, p. 241:—"Le tarif qui fixe avec tant d'exactitude tous "les droits qui sont dus aux avoués pour leurs vacations "et actes, ne leur accorde rien pour l'arbitrage, seulement "l'art. 77 leur taxe une requête pour obtenir la nomination "d'un tiers arbitre, etc." Also, p. 242. "Si les parties "jugent à propos de charger un avoué de la rédaction de "leurs mémoires et moyens de défense les frais que le "concours de cet officier ou de tout autre mandataire occa- "sionne, ne peuvent pas être répétés contre l'adversaire, "même quand celui-ci serait définitivement condamné."

With regard to the second question, as to whether the appellant had the right to plead the illegality and nullity of the taxation by the Hon. Mr. Justice Rainville—it is also submitted that this was the proper and only course

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for them to take : By sub-sec. 29 of sect. 9 of the Act referred to, it is provided that "every proprietor who shall "not be paid in full, in capital, interest and costs, the "amount to him awarded by the arbitrators, within two "months after such award, may then exercise his recourse "against the Company to recover the property in and "possession of his land, and this by ordinary civil action, "in which he may demand the damages to which he "may be entitled."

It will, therefore, be seen that though by sub-section 20 the Judge has the right to tax the costs of arbitration, his judgment on such taxation is not executory, nor is any provision made for the revision of such taxation; but by above sub-sec. 29 the proprietor may exercise his recourse by ordinary civil action; it is then, therefore, that the Company may complain of the illegality of the taxation or set up any defence to the action. If this were not the case why give an action for the costs? for both parties are liable to the arbitrators for their costs. At the time the bill of costs was presented to Mr. Justice Rainville for taxation, the appellant denied the right of the respondents to have the fees claimed by their attorneys taxed against the appellant, and though the bill of costs was so taxed, it did not partake of that character which would cause the taxation in question to become *chose jugée*. If it were so, great injustice might be done, and parties would be without any relief. Moreover, sub-sec. 20 does not say that the Judge shall tax the costs either in favor of the proprietor or against the Company—nor does the section in question say that these costs are to include attorney's fees; clearly, only the arbitrator's costs are intended.

It may have been and no doubt was a prudent course for the respondents to take, to employ an attorney to look after their interests, but it certainly does not follow that the appellant should have to pay whatever fees such attorney might think proper to charge his clients.

R. Préfontaine, for the respondents :—

1o. *Question.*—Est-ce qu'il y a eu consolidation des neuf

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actions en Cour de Circuit avec l'instance pendante en Cour Supérieure entre l'appelante et les intimés ?

Y a-t-il eu un seul jugement prononcé par la Cour Supérieure dans l'instance entre l'appelante et l'intimé Pierre Vincent, et les neuf causes où les intimés P. E Hemard, Arsène Charron, Elie Dubuc, Philias Bordua, Antoine Fournier dit Préfontaine, Charles Dubuc, Victor Charron, William Davis, George Charron étaient demandeurs contre l'appelante ?

L'appelante peut-elle appeler devant cette Honorable Cour des neuf condamnations prononcées contre elle devant et par la Cour de Circuit le 28 février, 1883, dans les differentes causes ?

La requête présentée par les intimés pose la question carrément.

Nous soumettons qu'il n'y a pas eu de consolidation des dites causes pendantes devant la Cour de Circuit avec l'instance pendante en Cour Supérieure ; et nous n'en voulons pas de meilleure preuve que les jugements eux-mêmes. D'ailleurs nous pouvons référer à Carré et Chauveau qui posent en principe absolu, qu'il ne peut pas y avoir de consolidation entre des causes ressortissant à des juridictions différentes.

Carré & Chauveau, vol. 1, Page 152, note 14ème "Lorsque plusieurs instances pendantes dans différents tribunaux ressortissant à des Cours différentes, n'ont pas une connexité parfaite entr'elles *et les mêmes parties*, il n'y a pas lieu qu'elles soient renvoyées à un même tribunal."

C'est bien là ce qu'a compris l'Hon. Juge Rainville qui, sur la motion de consolidation a réuni seulement les canses de Cour de Circuit et a ordonné qu'elles fussent transmises à la Cour Supérieure pour y êtres *unies* à la cause pendante devant la Cour, s'il y avait lieu, comme il appert par la motion produite *in re* Charron v. Montréal et Sorel.

2ème Question.—Le jugement prononcé par Son Honneur le Juge Rainville, le 3 mai 1882, taxant les différents mémoires de frais, et cela après audition des parties, contradictoirement, est-il un jugement susceptible de révision

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par un autre Juge, soit par une autre Cour et constitue-t-il chose jugée ?

Ce second point ne peut pas souffrir beaucoup de difficulté. Si le jugement de l'Honorable Juge Rainville, jugement prononcé d'après les dispositions de l'Acte des chemins de fer de la Province de Québec, 43 et 44 Vic., c. 43, était susceptible de révision ou d'appel, l'Acte des chemins de fer devrait le dire. Mais il n'y a rien dans cet acte qui puisse donner lieu à de semblables prétentions. En cela l'Acte des chemins de fer, n'est pas plus extraordinaire que notre Code de Procédure Civile qui ne permet pas l'appel d'un jugement taxant un mémoire de frais.

Dans la présente cause, il apparait que ce jugement de l'Honorable Juge Rainville n'a été prononcé qu'après contestation et après audition des parties.

3*me Question*.—L'Hon. Juge Rainville dans l'exercice de ses fonctions, et agissant sous l'opération de la loi des chemins de fer 43 et 44 Vic., c. 43, clause 9, avait-il ce droit d'accorder aux expropriés les frais qu'ils ont été obligés de faire en vertu de l'acte d'arbitrage ?

Ces frais doivent-ils comprendre non seulement leurs déboursés, mais encore les honoraires des avocats qu'ils ont été obligés d'employer pour défendre leur cause devant le tribunal d'arbitrage ?

Le jugement dont est appel, sans se prononcer carrément sur ce point, semble cependant admettre l'affirmative de manière à ne pas laisser de doute.

Il faut bien remarquer que la procédure en vertu de l'acte des chemins de fer, est une procédure sommaire, spéciale et expéditive.

Par cet acte, il est dérogé aux règles du droit civil ordinaire, tout cela, bien entendu dans un but d'intérêt public, mais toujours de manière à protéger les propriétaires des terrains sur lesquels une Compagnie de chemin de fer veut construire sa voie ferrée et ceux qui ont des intérêts dans ces propriétés.

Comme nous venons de le dire tout est expéditif, mais

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la loi tout en accordant des privilèges exceptionnels aux Compagnies de chemins de fer a en vue aussi de sauvegarder les intérêts des expropriés.

Un tribunal composé de trois arbitres est choisi pour établir l'indemnité que les compagnies de chemins de fer doivent payer au propriétaire pour la prise de possession de son terrain et les dommages résultant à sa propriété de la construction du dit chemin de fer à travers sa propriété.

Ce tribunal d'arbitrage se compose de trois arbitres, comme nous venous de le dire, l'un choisi par la compagnie de chemin de fer, l'autre par le propriétaire, et le troisième par les deux arbitres respectifs nommés par l'exproprié et la compagnie de chemin de fer.

A défaut d'accord entre eux, ce tiers-arbitre doit être nommé par un juge de la Cour Supérieure.

Voici donc, un tribunal légalement constitué pour adjuger sur les prétentions des parties respectives, après avoir entendu la preuve qui doit être faite de part et d'autre, à moins bien entendu que les arbitres en viennent à pouvoir une sentence arbitrale sur la simple visite des lieux.

Devant ce tribunal d'arbitrage les parties doivent comparaître et faire valoir leurs prétentions.

Il se soulève dans des cas semblables, et des questions de fait et des questions de droit. Est-il raisonnable de supposer que des cultivateurs, ou des personnes n'ayant aucune connaissance ordinaire des affaires, vont pouvoir faire valoir leurs droits devant ce tribunal sans être représentés par des hommes de loi compétents dans ces questions ? Les arbitres eux-mêmes seront-ils en état, nous parlons dans le cours ordinaire des affaires, seront-ils en état de se prononcer avec connaissance de cause, et de manière à ne commettre ni injustice ni erreur, sans être éclairés sur les faits et sur le droit par des hommes compétents ? Autant de questions dont la seule réponse est la position prise par les intimés et maintenue déjà par deux juges différents qui se sont prononcés sur ce point.

Si les expropriés doivent se suffire à eux-mêmes devant

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le tribunal d'arbitrage, s'il ne leur est pas permis de se servir de procureurs en loi qu'en les payant eux-mêmes ; de deux choses, l'une ; ou leurs intérêts ne seront pas protégés, ou en les protégeant, ils seront entrainés dans des frais considérables qui pourront peut-être absorber le montant de l'indemnité.

La discussion ne peut pas être longue en face des conséquences auxquelles seraient exposées les propriétaires sur les terrains desquels des chemins de fer peuvent être construits. Nous disons propriétaires pour désigner d'une manière générale tous ceux qui ont des droits à ou dans une propriété.

D'ailleurs cette jurisprudence a été universellement suivie dans le sens des prétentions des intimés. Dans le district de Montréal, devant les juges de la Cour Supérieure sous l'opération d'une loi des chemins identique à celle qui nous régit dans l'espèce, les juges ont toujours maintenu que les frais d'arbitrage comprenaient les frais d'avocats.

Ici il s'agissait de faire la distinction entre les *frais d'arbitrage, costs of arbitration*, qui est un mot général, celui dont se sert notre Statut 43 et 44 Vic. c. 43, et le mot "*costs of award,*" *frais de sentence arbitrale*, dont se servent un grand nombre d'auteurs anglais qui traitent la question.

Nous référons aux jugements prononcés en semblable matière par les Honorables Juges Mackay et Johnson, *Ex parte Patrick Grace*, party expropriated, and the Government of the Province of Quebec, expropriating, and Joseph Duhamel, distrayant costs of expropriation, S. C. April, 1881, 5 Leg. News, 118.

Nous soumettons que les jugements des Honorables Juges Rainville et Jetté sont inattaquables.

Que l'Hon. Juge Rainville avait le droit de taxer en faveur des intimés les frais encourus par eux pour leur propre protection devant le tribunal d'arbitrage.

Que ces frais ayant été taxés contradictoirement, le 3 Mai 1882, cette taxe a l'effet de chose jugée entre les parties.

Que le montant alloué n'est pas du tout exorbitant.

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Que l'Honorable Juge Jetté en réclamant qu'il n'y avait pas lieu de réviser le jugement du 3 mai a prononcé suivant la loi et la jurisprudence.

RAMSAY, J.:—

The principal question presented in this case is more important than it at first seems to be. The question is whether in non-judicial proceedings counsel can be admitted, and their fees taxed.

The appellants were sued for the amount of costs taxed against them by a Judge of the Superior Court, under section 9, § 20 of 43-44 Vic., c. 43 (Q.) The Judge allowed respondent costs of the advocates for attendance. To this appellants object, and say that an arbitration is substituted to avoid the costs of regular litigation, and that the costs to be taxed are only necessary outlay. The Judge in the Court below maintained the action, and in doing so he laid down two propositions:—first, that the power accorded to the Judge in Chambers was to tax costs generally, and that therefore he had a discretion to allow fees, as being part of the costs. Secondly, that the Judge in Chambers having exercised the powers conferred upon him, the Court had no jurisdiction to interfere.

A question of jurisdiction arises, owing to the consolidation of nine non-appealable cases in the Circuit Court, with the appealable action of Vincent. It is contended that as to the nine non-appealable actions, the judgment of the Court below is final. I think we have allowed actions, belonging to different jurisdictions, to be consolidated. If so, the consolidated suit must decide as to its appealability.

The judgment is confirmed.

DORION, CH. J.:—

This is not an ordinary arbitration to which two parties consent: it is an arbitration to which one of the parties is forced to come. It is not reasonable, then, that he should lose a great part of his indemnity, in order to pay the fees of his lawyer. The Company cannot complain

because the Judge, in his discretion, taxed these costs. There is no appeal from a taxation made by a Judge.

On the question of the consolidation of the causes, we think the appeal was well brought.

Mr. *Kerr*—There is one point to which I would draw the attention of your Honors. The arbitration was not under the Act at all. The bond merely says the proceedings shall be conducted under the provisions of the Act. "It being understood that said arbitrators shall proceed "to the discharge of their duties and office in the same "manner as if they had been named in virtue of proceed-"ings taken under the Quebec Consolidated Railway "Act, 1880."

DORION, CH. J.—What is the meaning of that? Does it mean that because the arbitrators were not named by the Judge, therefore the arbitration is not under the Act?

Mr. *Kerr*—No; it was a voluntary arbitration—not a forced arbitration.

RAMSAY, J.—It became then a contractual obligation to abide by the Statute.

DORION, CH. J.—The arbitration took place for the object of the Statute. We consider it as being a substitute for that provided by the Statute.

Judgment confirmed.

Kerr & Carter, attorneys for appellants.

Préfontaine & Major, attorneys for respondents.

(J. K.)

January 20, 1883.

Coram DORION, CH. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

ELIE GAUTHIER,
(*Defendant in Court below*),
APPELLANT;

AND

ALLAN RITCHIE,
(*Plaintiff in Court below*),
RESPONDENT.

Sale—Hypothec—Clause of "franc et quitte."

HELD:—In an action to oblige the vendor to execute a deed of sale of real estate, or pay damages: where the vendor's agent wrote to the purchaser as follows:—"I can offer you the house at $4,300 on the following terms: $1,000 cash, $1,000 in about two years; balance $2,300, mortgage on ground, can remain as long as buyer requires;" that this was equivalent to the clause of *franc et quitte* with the exception of the hypothec mentioned in the letter, and that the vendor thereby promised and was bound to give a clear title with the exception only of the $2,300; and he not having executed such deed, and having sold the property to a third party, the judgment which condemned the vendor to pay $300 damages, was confirmed.

The appeal was from a judgment of the Court of Review, reversing a judgment of the Superior Court.

The judgment of the first Court (CHAGNON, J.), Feb. 24, 1881, was as follows:—

"La Cour, etc.....

"Considérant que tel que l'allègue le demandeur lui-même dans son action, la vente de la propriété désignée dans la déclaration a été faite et acceptée entre les parties en conformité aux conditions énoncées dans la lettre du nommé Jones, en date du 30 mai 1880; et considérant qu'il n'appert pas par le dossier que le dit Jones ait jamais promis par la dite lettre, ou subséquemment décharger et radier les hypothèques qui pouvaient affecter la dite propriété avant la passation de tout contrat entre les dites parties;

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"Considérant qu'il n'appert pas non plus par la preuve que le défendeur ait jamais promis décharger telles hypothèques avant la passation du dit contrat;

"Considérant qu'en supposant que le demandeur n'aurait découvert l'existence des dits hypothèques que depuis son protêt du 20 avril 1880, telle découverte ne pouvait tout au plus lui conférer que deux droits d'après la loi et d'après la preuve, savoir :—premièrement—de pouvoir se désister de son achat, sans devenir pour cela responsable d'aucuns dommages vis-à-vis du défendeur, la preuve (voir le témoignage du nommé Cleveland corroborant en cela le défendeur lui-même) constatant que le demandeur s'était réservé le droit, avant de signer définitivement le contrat, d'examiner les titres et papiers concernant la propriété aux fins de connaître la solidité de son propre titre; et secondement—de passer et signer le contrat nonobstant l'existence des dites hypothèques, en utilisant à son profit les bénéfices que la loi pouvait lui conférer, bénéfices consistant à retenir toute et chaque partie du dit prix de vente, jusqu'à ce que les dites hypothèques eussent été radiées, ou que bon et valable cautionnement lui eut été fourni;

"Considérant que le demandeur n'a pas le 28 avril 1880, en l'étude du notaire Hétu, notifié le défendeur qu'il était prêt à passer le contrat, mais qu'attendu l'existence des dites hypothèques, il entendait bénéficier de la loi sous ce rapport, et qu'il entendait en conséquence retenir les mille piastres stipulées payables comptant, aussi bien que le surplus du dit prix de vente, jusqu'à telle radiation ou cautionnement, mais considérant que dès le 27 avril 1880, dans son protêt à cet effet, et le 28 avril pareillement en l'étude du dit Mtre. Hétu, le dit demandeur aurait refusé de passer tout contrat avec le défendeur, tant que les dites hypothèques n'auraient pas été en totalité radiées et déchargées;

"Considérant que dans toutes les relations des parties relativement à la vente de la dite propriété, il n'y a jamais eu de garantie conventionnelle relativement aux hypothèques qui pouvaient grever la dite propriété; et con-

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sidérant que les parties, attendu le défaut d'une convention spéciale à cet effet, doivent être censées s'être assujéti à la simple garantie de droit avec le bénéfice de rétention du prix, tel que la loi en permet l'exercice;

"Considérant qu'il appert, il est vrai, par la preuve que le défendeur, pour aider le demandeur, aurait avec le nommé Cleveland, agissant dans les intérêts du demandeur, essayé d'obtenir le consentement des créanciers hypothécaires à décharger la dite propriété, le demandeur dans une telle éventualité offrant de payer tout son prix de vente comptant; mais considérant qu'outre le fait de la non-réussite des parties sous ce rapport, telles démarches n'ont pu avoir l'effet d'anéantir les conventions de vente originairement faites entre les parties, et en vertu desquelles le demandeur réclame leur teneur dans la présente action;

"Considérant que le fait que le demandeur aurait vendu subséquemment au 28 avril 1880, au nommé Auld, et aurait finalement obtenu le consentement des créanciers hypothécaires à décharger complètement la propriété en question avant que le contrat fut signé, ne peut avoir l'effet de changer les conventions de vente faites entre les parties en cette cause, le 20 avril précédent et les jours suivants:

"Considérant qu'ainsi le demandeur ayant le 28 avril 1880, insisté sur un prétendu droit que ni la loi, ni la convention ne lui conférait; Attendu la nature du protêt du défendeur en date du 27 avril 1880, a perdu tout droit dans et à la dite propriété, et a perdu tout droit de se plaindre de la vente que le défendeur a pu en faire subséquemment;

"Maintient les défenses et déboute l'action avec dépens, distraits, etc."

The judgment in Review (TORRANCE, RAINVILLE, JETTÉ, JJ.); Montreal, April 24, 1881, was as follows:—

"La Cour Supérieure siégeant présentement à Montréal comme Cour de Révision, après avoir entendu les parties par leurs avocats sur le jugement prononcé en cette cause le 24 février 1881, par la Cour Supérieure du district de

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Montréal, avoir examiné le dossier et la procédure et délibéré ;

" Attendu que le demandeur demande que le défendeur lui passe un titre de vente d'une propriété décrite comme étant la subdivision 24 de la subdivision 73 du lot numéro 754 du plan officiel du quartier St-Antoine, et qu'il lui paie en outre une somme de $900 de dommage ;

" Attendu que le demandeur allègue que le défendeur lui a vendu la susdite propriété par convention intervenue entre eux le ou vers le 30 mars 1880 ;

" Attendu que le défendeur plaide qu'il a toujours été prêt à passer le titre au demandeur, mais que ce dernier refuse, en autant que la propriété était grevée d'hypothèques pour au-delà de $2,300, lequel montant seul devait rester comme grevant la dite propriété d'après les prétentions du demandeur ;

" Considérant qu'il est prouvé que la dite vente a eu lieu à raison de $4,300 ;

" Considérant que par la lettre du 30 mars 1880, écrite au demandeur par l'agent du défendeur, la balance de $2,300 devait rester comme hypothèque sur la propriété aussi longtemps que l'acquéreur le désirerait ;

" Considérant que la seule interprétation que l'on puisse donner à cette lettre est que le vendeur garantissait à l'acheteur qu'il n'y avait que la dite somme de $2,300 qui grevait le dit immeuble ;

" Considérant qu'en conséquence le dit demandeur est justifiable de ne pas accepter le titre à moins que le défendeur ne fasse disparaître les dites hypothèques ;

" Considérant qu'il est prouvé que le dit défendeur a, quelques jours après le dit 30 mars vendu la dite propriété à une tierce personne, pour une somme de $200 de plus qu'il n'avait vendu au demandeur, et que le dit demandeur a souffert des dommages réels pour la dite différence de prix ;

" Considérant qu'en outre le demandeur par suite de ses pas et démarches, protêt, etc., a souffert des dommages que la Cour estime à $100 ;

" Considérant qu'il y a erreur dans le dit jugement du

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24 de février dernier, renverse et annule le dit jugement, et procédant à rendre celui qui aurait dû être rendu par la dite Cour Supérieure ;

"Condamne le défendeur à raison de la non-exécution de la dite convention à payer au demandeur la somme de $300 avec intérêt du 13 mars 1880, jour de l'assignation, et les dépens d'une action de cette classe, distraits, etc."

Sept. 16, 1882.]

Bonin, for the appellant :—

L'appelant, propriétaire d'une maison de la rue Fort en cette cité, l'offrait en vente en 1880. Le 30 mars un nommé Jones, agent de l'appelant, écrivit une lettre à l'intimé pour lui faire connaître les conditions de vente. L'intimé n'a pas répondu à Jones, mais il a chargé M. Ansley d'écrire à l'appelant qu'il désirait transiger avec lui au sujet de sa propriété. La lettre d'Ansley est du 1er avril 1880, et le 9 avril l'appelant s'est rendu chez l'intimé qui, après quelques pourparlers, s'est déclaré prêt à acheter la propriété de l'appelant aux conditions énoncées dans la lettre de Jones. Cette lettre est dans les termes suivants :

"Montreal, 30 March, 1880.

"Dear Sir,—I can offer you the house No. 78, Fort street, at $4,300, on the following terms: $1,000 cash, $1,000 in about two years, balance $2,300, mortgage on ground, can remain as long as buyer requires or can be paid off at any time—interest 7 p. c. The above is the lowest price, but the first payment might be reduced somewhat if it is an object.

"Yours truly,

"H. Jones.

"Allan Ritchie, Esq., 26 Hospital street, city."

L'appelant a consenti à vendre aux conditions de cet écrit, et les parties sont convenues de se rencontrer le 19 avril 1880 chez L. O. Hétu, notaire, pour passer contrat de vente. Jones, qui n'avait pas eu connaissance de ces démarches, vendit de son côté à peu près dans le même temps à un nommé Auld. Il en avertit l'appelant qui lui apprit alors qu'il avait vendu antérieurement à l'intimé. L'appelant, se laissant guider par Jones qui lui représentait que la vente à l'intimé n'était pas valable, attendu que l'appelant s'était dépouillé du droit de vendre en se constituant un agent, l'appelant, disons-nous, ne se rendit

pas chez le notaire Hétu le 19 avril. L'intimé, dès le lendemain, 20 avril, le fit protester d'avoir à lui passer contrat à cinq heures de l'après-midi du même jour. L'appelant consulta alors son avocat, qui lui dit qu'il était tenu de vendre à l'intimé plutôt qu'au nommé Auld, parce qu'il avait vendu à l'intimé en premier lieu. L'appelant notifia alors l'intimé, par acte du 27 avril 1880, qu'il était prêt à lui vendre sa propriété aux termes convenus entre eux, lui intimant de se trouver le lendemain à 10 heures du matin chez le notaire Hétu pour passer contrat; et en même temps le notifiant qu'il considérerait son défaut d'exécuter alors ce contrat comme un refus d'acheter, et se croirait libre de disposer de sa propriété en faveur de qui bon lui semblerait. L'intimé, le même jour, répondit par un acte authentique qu'il se rendrait chez le notaire Hétu à l'heure indiquée, ajoutant que depuis la date de son premier protêt il avait découvert que la propriété en question était grevée d'hypothèques jusqu'à concurrence de $5,595; que pour aider l'appelant à faire disparaître ces hypothèques il était prêt à payer tout son prix d'acquisition au comptant; et que si l'appelant faisait défaut de lui passer titre franc et quitte de toute hypothèque sous le délai de 24 heures il le tiendrait responsable de tous dommages et dépens. Le 28 avril 1880 les parties se rendirent au bureau du notaire Hétu, mais elles ne purent s'entendre, l'intimé croyant avoir droit de forcer l'appelant à rapporter radiation des hypothèques avant la passation du contrat; l'appelant, de son côté, réclamant qu'il n'était tenu ni par la loi ni par la convention de faire disparaître les hypothèques avant de passer le contrat; et disant à l'intimé qu'il était son garant et qu'il ferait disparaître les hypothèques à l'échéance des dettes qu'elles étaient destinées à garantir. De là l'action de l'intimé, qui réclame $900 de dommages-intérêts, et allègue dans sa déclaration qu'il avait acheté cette maison dans la vue de l'habiter, qu'il a en conséquence transporté son ménage de Chatham, dans la province d'Ontario, ce qui lui a occasionné de grandes dépenses, et qu'il a fait en outre de grandes dépenses pour coût d'actes notariés; de

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ce chef, il réclame $200. Dans le paragraphe suivant de sa réclamation l'intimé dit qu'il a acheté cette maison dans le but de la revendre, qu'il aurait certainement pu faire un bénéfice de $700 sur la revente; sa déclaration relate aussi tous les faits que nous venons d'énumérer, en y ajoutant quelques autres qui n'ont pas été prouvés; ainsi il allègue que l'intimé s'était engagé à vendre sa propriété libre et quitte de toute hypothèque, il est prouvé qu'il n'y a jamais eu entre les parties la moindre explication à ce sujet; il allègue aussi que les créanciers hypothécaires du vendeur s'étaient déclarés prêts à dégrever la propriété des hypothèques, si le prix de vente de l'intimé leur était payé à eux; c'est le contraire qui est prouvé.

Les conclusions de la déclaration sont que l'appelant soit condamné à payer $200, montant des dommages soufferts, et en outre à donner à l'intimé un titre quitte et libre de toute hypothèque à sa propriété, dans un délai déterminé, et à défaut à payer $700 de dommage pour le gain dont il a été privé.

L'appelant a plaidé en substance qu'il n'avait jamais pris l'engagement de vendre sa propriété libre et quitte de toute hypothèque à l'intimé, qu'il avait toujours été prêt à la lui vendre aux conditions arrêtées entre eux, que suivant ces conditions il n'était pas tenu par la loi ni par la convention de faire disparaître les hypothèques qui grevaient sa propriété, avant de passer l'acte de vente; que si l'intimé avait souffert des dommages il devait se l'imputer à lui-même, puisque c'est lui qui avait refusé de passer contrat aux conditions convenues.

La Cour Supérieure a donné gain de cause à l'appelant. L'intimé a porté ce jugement en révision et a obtenu contre l'appelant une condamnation en dommages de $300. La Cour de révision a jugé en fait que l'appelant avait garanti à l'intimé qu'il n'y avait que la somme de $2,300 qui grevait sa propriété, et qu'en conséquence l'intimé avait eu droit d'exiger un titre libre et quitte de toute hypothèque. Cette garantie du vendeur, la Cour de révision l'a trouvée dans l'interprétation seule de la

lettre du 30 mars; et elle n'a fait découler le droit de l'acheteur à un titre de propriété libre de toute hypothèque ni de la loi, ni d'aucune autre convention des parties, mais de cette seule garantie. Nous croyons que ce jugement fait une fausse appréciation des faits et une fausse application de la loi. Remarquons d'abord qu'il y a entente entre l'appelant et l'intimé sur presque toutes les questions du litige. L'intimé se base sur l'offre de vente aux conditions énoncées dans la lettre du 30 mars pour forcer l'appelant à lui donner un titre à sa propriété, et l'appelant, le vendeur, se déclare prêt à vendre à ces conditions mêmes. Le seul point de divergence entre eux est relatif à l'obligation de faire disparaître les hypothèques avant la passation du contrat. Le vendeur se reconnaît garant des hypothèques et promet se libérer envers ses créanciers à l'échéance de ses dettes.

L'action est celle d'un acquéreur réclamant à son vendeur des dommages-intérêts pour inexécution de ses obligations. Or, auquel de ses engagements ou de ses obligations le vendeur a-t-il manqué? Il s'est engagé à vendre aux termes énoncés dans l'écrit du 30 mars, il a toujours été prêt à exécuter cet engagement, mais l'acheteur refuse, lui, de passer contrat si les hypothèques qui grèvent la chose vendue ne sont pas radiées au préalable. Or, 1o. le vendeur a-t-il pris cet engagement de vendre sa chose libre et quitte de toute hypothèque?

2o. Le vendeur qui ne déclare pas les hypothèques qui grèvent sa chose est-il tenu par la loi de faire disparaître ces hypothèques avant de passer contrat?

Ce qui semble avoir embarrassé le débat devant la Cour de Révision, c'est qu'il s'agissait d'une vente consommée, il est vrai, mais pour laquelle le contrat n'avait pas encore été mis par écrit. Or, qu'avait à faire la rédaction du contrat dans le cas actuel? Absolument rien. La vente était devenue parfaite par le consentement des parties, et il est évident qu'elles n'avaient pas entendu subordonner la validité et l'existence de la vente à la rédaction *par écrit* du contrat. Car si tel avait été le cas, le défaut d'entente sur les conventions au moment de la rédaction du

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contrat, aurait été une excuse valable pour le vendeur, qui eût pu refuser de compléter une vente restée à l'état embryonnaire. Si donc, la vente était complétée dès le 9 avril, l'acheteur, qui dit n'avoir découvert que le 20 avril les hypothèques dont était grevé l'immeuble, s'est trouvé dans le cas de l'art. 1535, c'est-à-dire qu'ayant juste sujet de craindre d'être troublé par une action hypothécaire, il pouvait différer le paiement du prix jusqu'à ce que son vendeur eût fait cesser le trouble ou lui eût fourni caution. Avait-il le droit de demander la résolution de la vente? Car s'il n'avait pas le droit de demander la résolution de la vente, il n'avait pas non plus le droit de demander des dommages-intérêts. Il est clair en effet que la demande de dommages-intérêts repose ici sur la non-exécution des obligations du vendeur. Or, quelle obligation le vendeur a-t-il manqué d'exécuter par sa faute? Est-ce l'obligation de vendre? mais il reconnait avoir vendu. Est-ce l'obligation de passer titre? mais il a offert de donner un titre, à son acheteur, qui le refuse. Ce serait donc l'obligation de faire disparaître les hypothèques sans délai. Or, la loi impose-t-elle cette obligation au vendeur qui n'a pas déclaré les hypothèques qui grevaient sa propriété? Si la loi lui impose cette obligation, l'acheteur a droit à des dommages-intérêts au cas où le vendeur ne remplit pas cette obligation comme aussi il a le droit de demander la résolution du contrat; l'article 1065 de notre Code le dit en termes formels.

L'existence d'hypothèques non-déclarées peut-elle donner lieu à la résolution du contrat? Disons de suite que celui qui hypothèque son immeuble n'en conserve pas moins le droit de le vendre. L'article 2053 de notre Code porte que "l'hypothèque ne dépouille ni le débiteur ni le "tiers-détenteur qui continuent de jouir de la propriété "et peuvent l'aliéner."

Quelles sont les obligations du vendeur? Il est tenu d'après la loi de livrer et de garantir la chose qu'il vend. (Art. 1491). La délivrance, d'après l'article 1492, est le transport de la chose vendue en la puissance et la possession de l'acheteur; la garantie que le vendeur doit à l'ac-

quéreur a pour objet la possession paisible de la chose vendue.

Cette double obligation du vendeur a été remplie dans le cas actuel de la part du vendeur, il était propriétaire par bons titres, cela n'est pas contesté ; et la propriété de l'immeuble pouvait être valablement transmise à l'acquéreur. L'existence des hypothèques sur la chose vendue n'empêche la chose ni de passer en la puissance et propriété de l'acheteur, ni d'être en sa possession effective, et tant que la menace d'éviction n'est pas réalisée la possession de l'acquéreur est paisible.

Il en serait autrement si le vendeur n'était pas propriétaire de la chose vendue, car alors il ne pourrait pas transmettre la propriété de la chose vendue et manquerait ainsi à une de ses obligations ; et l'acheteur pourrait alors le forcer à exécuter l'obligation si elle était possible, ou demander la résolution du contrat. Aussi notre art. 1487 déclare nulle la vente de la chose d'autrui.

Si l'acheteur était évincé, nul doute qu'il eût alors le droit de demander la résolution de la vente ; car alors le vendeur manquerait à son obligation de garantir, mais tant que l'éviction n'a pas lieu, l'acquéreur n'a pas le droit de demander la résolution de la vente et encore moins le droit de contraindre le vendeur à faire cesser de suite le danger d'éviction. Arts. 1508, 1517 et 1518.

Il existe des arrêts à ce sujet. La Cour de cassation a jugé "Lorsque l'acquéreur, qui a stipulé un terme pour "le paiement, vient à découvrir que l'immeuble vendu "est grevé d'inscriptions hypothécaires non déclarées, qui "peuvent l'obliger à payer son prix avant le terme, il n'a "pas pour cela le droit de demander immédiatement la "résolution de la vente : l'existence de ces inscriptions "ne constitue qu'un juste sujet de crainte de trouble, qui "l'autorise seulement à suspendre le paiement jusqu'à ce "que le vendeur l'ait fait cesser." Sirey 1827, 2, 161.

Jugé : "la simple menace ou crainte d'éviction n'autorise pas l'acquéreur à demander la résolution de la vente ; elle l'autorise seulement à suspendre le paiement de son prix jusqu'à ce que le vendeur ait fait cesser la

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crainte d'éviction." Sueur c. Guillaume, S. V. 1839, 1, 72, —Voir aussi S. V. 1854, 2, 9.

Et la Cour de Révision de Québec a jugé, dans la cause de *Talbot* v. *Béliveau*: "That the purchaser of a property "with warranty against 'every description of trouble or "eviction which may arise from whatsoever source,' but "whose title does not contain the clause 'free from all "debts and hypothecs,' cannot demand a resiliation of "the sale in default of the removal of certain hypothecs "which may afterwards appear to be a charge upon the "property." Rap. Jud. de Québec, vol. 4, page 104.

Voici ce que dit Laurent, vol. 24, No. 325, page 317:

"En quoi consiste le droit de l'acheteur? L'article 1653 "le dit: 'Il peut suspendre le paiement du prix jusqu'à "ce que le vendeur ait fait cesser le trouble.' L'acheteur "n'a donc pas le droit de demander la résolution de la "vente, ni la nullité. Une cour s'y était pourtant trompée, "l'arrêt a été cassé. Bien entendu, tant qu'il n'y a qu'une "simple crainte d'éviction. Si l'acheteur soutient que "l'immeuble vendu n'appartenait pas au vendeur, et s'il "peut en fournir la preuve, il pourra immédiatement agir "en nullité de la vente en vertu de l'article 1599.

"L'acheteur peut encore demander la résolution de la "vente lorsque le vendeur s'est obligé par le contrat de "vendre la chose *quitte et libre de toute hypothèque*, et qu'elle "se trouve grevée d'une inscription hypothécaire. Vaine-"ment le vendeur opposerait-il les dispositions de l'article "1653. Il n'y a pas lieu à appliquer cet article, lorsque "le vendeur a contracté une obligation formelle qu'il ne "remplit pas: on se trouve alors dans le cas de l'article "1184. L'acheteur agit non parce qu'il craint d'être "évincé, mais parce que le vendeur manque à ses enga-"gements." Duvergier, tome 1, No. 426.—Duranton, tome 10, No. 437.

L'annotateur de Sirey, dans une note au bas d'un arrêt que nous avons rapporté plus haut 1827, 2, 162, après avoir résumé la doctrine des auteurs, dit: "Il nous paraît "impossible d'admettre qu'en règle générale les réticences "du vendeur touchant les charges hypothécaires qui grè-

" vent l'immeuble vendu doivent être considérées comme " une cause de résolution du contrat."

Un peu plus loin, il ajoute : " La loi ne parle nulle part " de la demande en résolution proprement dite. Les effets " de l'hypothèque et par conséquent son existence sem- " blent donc aux yeux du législateur une condition natu- " relle à la vente, une sorte d'état normal et compatible " avec son exécution sans consentement particulier à cet " égard. La loi donne à l'acheteur la voie du délaisse- " ment qui résout suffisamment et de plein droit le con- " trat ; pourquoi lui aurait-elle en outre accordé la résolu- " tion qui ne changerait rien à sa position. D'ailleurs, " elle a précisé les cas de résolution (Cod. Civ., 1636-1638) " et n'y a pas compris l'existence d'hypothèques ; loin de " là, elle a expressément prévu cette hypothèse dans " l'art. 1653 et n'en a fait qu'une cause de suspension de " paiement. On est donc fondé à dire que, par elle-même, " l'existence d'hypothèques, dans le cas où il n'a été rien " stipulé ou déclaré, n'est pas une cause de résolution " mais seulement de suspension de paiement."

Plus loin encore, il dit : " Si les hypothèques donnent " seulement lieu de craindre une action hypothécaire, la " demande en résolution ne serait pas fondée ; la loi ne " fait pas d'un sujet de crainte une cause de résolution, il " faut aux termes de l'art. 1184 que le vendeur ne satis- " fasse pas à ses engagements ; l'inquiétude plus ou moins " fondée de l'acheteur ne suffit donc pas pour résoudre le " contrat."

L'article 1535 de notre Code correspond à l'article 1653 du Code Napoléon. Or cet article, en indiquant ce que l'acheteur en péril d'éviction peut faire, a indiqué ce qu'il ne peut pas faire ; et en ne lui accordant que le droit de suspendre le paiement jusqu'à la cessation du trouble, il lui a par là même refusé le droit de demander la résolution du contrat, et à plus forte raison le droit de contraindre le vendeur à faire cesser de suite le danger d'éviction, contre lequel il est réputé protégé d'une manière suffisante, par le seul fait du non-paiement du prix de

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vente. En donnant à l'acheteur la faculté de suspendre le paiement de son prix jusqu'à ce que le vendeur ait fait cesser le trouble, la loi a garanti l'acquéreur contre le danger de perdre le prix.

L'article 1535 est placé au chapitre des obligations de l'acheteur; en effet, il a pour objet d'astreindre ce dernier au cas de simple danger d'éviction, soit à payer son prix moyennant caution, soit à se contenter pour toute sûreté de la suspension de paiement de ce prix, tant que l'éviction n'est pas réalisée. Car, dit Laurent au lieu déjà cité, No. 328: "L'article 1563, tout en garantissant les droits "de l'acquéreur, n'oublie pas ceux du vendeur. Si celui-ci "veut donner caution, l'acheteur sera tenu de payer le "prix nonobstant le trouble."

Il est toujours au pouvoir du vendeur de maintenir la vente en donnant caution contre le danger d'éviction; et s'il donne caution il ne peut pas être contraint à faire disparaître les hypothèques, la vente est valide et il a droit d'exiger son prix.

D'ailleurs l'acheteur qui retient le prix par devers lui à titre de sûreté, n'est-il pas suffisamment protégé? Mais oui, la vente ne lui confère que des droits sans lui imposer aucune obligation. Il est mis en possession de l'immeuble, il en jouit sans être tenu de payer quoi que ce soit. Aussi de nombreux arrêts ont consacré la doctrine que le vendeur, tenu de donner caution pour toucher son prix, n'est obligé de donner caution que pour le prix en capital et non pour les intérêts et les dommages auxquels pourrait donner lieu l'éviction.

Jugé: — "Lorsque l'acquéreur d'immeuble, menacé d'é-"viction est condamné à payer son prix à la charge par "le vendeur de donner caution, l'obligation de fournir "caution ne porte que sur le capital de la somme que "l'acheteur doit encore, l'acheteur ne peut l'exiger ni "pour les intérêts de cette somme, ni pour les accomptes "antérieurement donnés au vendeur, ni pour les dom-"mages-intérêts qui pourraient résulter de l'éviction." S. V. 8, 2, 411.

Et la Cour de cassation, 22 novembre 1826, a jugé:

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"Que le vendeur qui veut toucher son prix de vente, "nonobstant une crainte d'éviction, n'est pas tenu de "donner caution pour les dommages-intérêts auxquels "l'éviction pourra donner lieu et qu'il n'est tenu de donner "caution que pour le prix." Cette jurisprudence est approuvée par M. Duvergier, De la vente, tome 1er, No. 427.—Troplong, 618.

"Exiger des sûretés pour toutes les conséquences possibles de l'éviction, dit Duvergier (loc. cit.), ce serait abuser "de la position du vendeur, chercher un avantage pour "l'acheteur dans le danger de trouble dont il est menacé, "tandis que la seule chose équitable et logique, c'est de "garantir que le prix sera rendu si la vente n'est pas "maintenue. Quand l'éviction sera arrivée l'action en "dommages-intérêts, en remboursement des frais et loyaux "coûts, etc., s'exercera suivant la règle ordinaire; mais "avant l'éviction, même lorsqu'elle est à craindre, aucun "texte n'oblige le vendeur à donner caution pour assurer "l'exécution des condamnations qui pourront être pro-"noncées contre lui."

Cette doctrine donne beaucoup de force à la position prise par l'appelant. Car, qu'on le remarque bien, l'obligation de procurer radiation des hypothèques est une obligation de faire; le vendeur ne peut pas être forcé d'exécuter semblable obligation, car l'exécution peut ne pas être possible pour lui; l'acheteur ne peut pas demander de faire exécuter cette obligation par un autre pour le vendeur; de sorte que l'inexécution de cette obligation ne peut entraîner que des dommages intérêts, art. 1065, C. C. Or, dans le cas actuel, quels sont les dommages qui découlent de l'inexécution de l'obligation de faire disparaître les hypothèques? Aucun; les dommages que l'acquéreur réclame résultent de ce que le vendeur n'a pas passé le contrat, et non pas de ce qu'il a refusé de libérer l'immeuble. Or, si le vendeur n'a pas passé contrat, c'est la faute de l'acquéreur qui a refusé de suivre les conventions de la vente. Voyons, que serait-il arrivé si l'acheteur se fut déclaré prêt à passer contrat sans exiger que son vendeur rapportât au préalable la radiation des hypothèques?

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Le vendeur eût signé un titre à l'acquéreur qui aurait été mis en possession de l'immeuble vendu. Le vendeur lui eût garanti la possession paisible et continue de la chose vendue ; et comme l'acquéreur avait trouvé l'immeuble grevé d'hypothèques, il avait le droit de suspendre le paiement du prix jusqu'à ce que le vendeur eût fait cesser la crainte du trouble ou eût donné caution. Le vendeur n'avait pas demandé le prix, mais l'eût-il demandé que l'acheteur eût été bien fondé à le lui refuser alors. Le vendeur, pour toucher son prix de vente, aurait été obligé ou de donner caution, ou de faire disparaître une partie des hypothèques proportionnelle au prix de vente qu'il aurait voulu obtenir. L'acquéreur n'aurait souffert alors aucun dommage, le vendeur eût fait disparaître les hypothèques à leur terme d'échéance et l'acquéreur eût eu sa propriété ; libre à lui d'en disposer aux fins pour lesquelles il l'avait acquise. S'il a souffert des dommages, il doit se l'imputer à lui-même ; il ne peut les réclamer de son vendeur. "*Volenti not fit injuria.*" Si, au contraire, le vendeur n'eût pas payé ses créanciers hypothécaires à l'échéance de ses dettes, et que l'acquéreur eût été évincé, ce dernier alors, mais alors seulement, eût eu le droit de demander les dommages-intérêts auxquels aurait pu donner lieu l'éviction. Car lui accorder des dommages-intérêts en vue d'événements futurs qui n'arriveront peut-être jamais, c'est, suivant l'expression de Troplong, " confondre la crainte d'éviction non réalisée " avec une éviction consommée et accompagnée de son " escorte de dommages-intérêts, faire de l'obligation per- " sonnelle, de garantir une obligation réelle, de venir au " secours de l'acheteur."

Tant que l'éviction n'est pas réalisée le vendeur peut rendre la vente irrévocable en payant les créanciers hypothécaires, et tant qu'il n'est pas démontré que le vendeur est dans l'impossibilité de faire disparaître les hypothèques, l'acheteur n'a pas raison de se plaindre puisque le vendeur a satisfait à toutes ses obligations. Duvergier, t. 1er, pages 527 et 528.

Or, dans le cas actuel, il n'a pas été fait la moindre ten-

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tative pour démontrer que l'appelant n'était pas en état de faire disparaître les hypothèques, quand le temps serait venu de le faire. L'appelant a donc satisfait à toutes les obligations que la loi et la nature de son contrat lui imposaient envers l'intimé ; il n'est donc pas passible de dommages envers lui.

Mais la Cour de révision, sans se prononcer sur la question de savoir si l'acquéreur, surpris par des hypothèques non déclarées, a le droit d'exiger de son vendeur qu'il fasse disparaître ces hypothèques avant de passer titre, a trouvé que le vendeur dans l'espèce avait garanti à son acquéreur qu'il n'y avait aucune hypothèque grevant la propriété vendue et que l'acquéreur avait eu droit d'exiger un titre à une propriété entièrement libre.

Remarquons ici l'erreur manifeste dans laquelle est tombée la Cour de Révision, en se livrant à un travail d'interprétation que rien ne justifiait dans les circonstances. Nous soumettons qu'il n'y avait pas lieu à interpréter l'écrit du 30 mars. Les termes de cet écrit sont clairs et précis, ils doivent être pris dans leur sens littéral. Notre article 1013, Code Civil, qui statue "que lorsque " la commune intention des parties dans un contrat est " douteuse, elle doit être déterminée par interprétation " plutôt que par le sens littéral des termes du contrat," doit se combiner avec ce que dit Domat : "Si les termes " d'une convention paraissent contraires à l'intention des " contractants, d'ailleurs évidente, il faut suivre cette in- " tention plutôt que les termes." Voilà le vrai sens de la loi. " *Cum in verbis nulla ambiguitas est, non debet admitti* " *voluntatis quæstio.*"

L'art. 1156 du Code Napoléon, dit Larombière, 1er vol., page 617, n'est applicable que dans les cas où les termes expriment mal l'intention des parties et où elle se trouve *d'ailleurs manifeste.* "Interpréter," ajoute-t-il plus loin, "n'est pas refaire une volonté, c'est seulement en " rétablir l'expression."

Demolombe, vol. 25, page 4, dit, No. 4 : "Il n'y a lieu à " l'interprétation que dans le cas où les termes de la con- " vention sont obscurs et ambigus." Plus loin, il ajoute :

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"Lors donc que les termes de la convention sont clairs, il "faut les appliquer d'après leur sens littéral; et ce serait "un dangereux abus que de s'en écarter pour substituer "une interprétation plus ou moins divinatoire et arbi- "traire au sens net et précis, que présentent les termes "mêmes de la convention."

Ici il n'y a ni obscurité ni ambiguité dans les termes de la lettre du 30 mars. Où trouve-t-on cette intention évidente de vendre sa chose libre et quitte d'hypothèques de la part du vendeur? N'arrive-t-il pas tous les jours qu'un propriétaire vend des propriétés grevées d'hypothèques? Il est possible que l'intimé ait eu l'intention d'acheter cette propriété libre et quitte de toute hypothèque; pourquoi n'a-t-il pas exprimé cette intention? S'il l'eût fait, il aurait découvert alors que ce n'était pas là l'intention du vendeur; les volontés des parties ne pouvant pas se rencontrer, il n'y aurait pas eu de contrat. C'est l'intention *commune* des parties qu'il faut découvrir et il faut la rechercher dans l'acte qu'elles ont fait en commun. Car, c'est dans le moment même où les parties ont fait leurs conventions, c'est-à-dire dans le moment où se forme le contrat, qu'il faut considérer les volontés, non pas prises isolément mais ensemble, alors qu'elles sont en présence.

D'ailleurs, dans le doute, le contrat s'interprète contre celui qui stipule. "L'entente est *au diseur*," disait Loysel. "Celui qui réclame l'exécution d'une obligation doit la "prouver." Ici l'acheteur demande l'exécution d'une clause qu'il dit avoir stipulée et par laquelle il aurait droit de forcer son vendeur à faire disparaître les hypothèques sans délai; qu'il la prouve. C'est à celui qui affirme à prouver, *actoris est probare*; et s'il ne prouve pas sa prétention, elle ne peut être admise, *actore non probante, reus absolvitur*.

Mais si toutefois il y a lieu d'interpréter l'écrit du 30 mars, l'interprétation que lui a donnée la Cour de Révision est erronnée.

En déclarant dans sa lettre du 30 mars l'hypothèque de $2,300, le vendeur, dit cette Cour, garantissait à l'ache-

teur qu'il n'y avait que cette hypothèque qui grevait l'immeuble. Mais cette interprétation n'est pas logique; de ce que le vendeur a déclaré à son acheteur une hypothèque qu'il a mise à sa charge, il ne s'en suit pas qu'il a affirmé qu'il n'y avait aucune autre hypothèque; seulement il a chargé son acquéreur de payer un de ses créanciers hypothécaires, et il s'est réservé le soin de se libérer lui-même envers ses autres créanciers; en se servant de ces mots "mortgage on ground," le vendeur entendait désigner l'hypothèque du bailleur de fonds; c'est-à-dire cette somme de $2,300 était le prix auquel il avait lui-même acheté le terraîn et qu'il n'avait pas encore payé.

Prétendra-t-on que sous le régime du Code Napoléon, Gauthier se serait rendu coupable de stellionat? Non, assurément, puisque d'après l'article 2059 de ce code le stellionat n'existe que quand le vendeur a présenté comme libres des biens hypothéqués, ou qu'il a déclaré des hypothèques moindres que celles dont ces biens sont chargés. Il faut qu'il y ait eu de la part du vendeur affirmation mensongère; ainsi que l'a décidé la Cour de cassation, S. V. 51, 2, 372.

Zachariæ, vol. 4, paragraphe 586, note 8, page 133, dit: "Le simple silence du débiteur ou du vendeur ne le rend "donc pas stellionaire. Il ne le devient que par suite "d'une déclaration expresse."

Rolland de Villargues—Vo. Stellionat, No. 11; Troplong—Contrainte par corps, No. 68; Duranton, vol. 18, Nos. 443-444; S. V., 61, 2, 546; S. V.. 53, 2, 270.

Ici le vendeur n'a pas présenté sa chose comme libre, et l'hypothèque qu'il a déclarée est exactement celle qui grevait sa propriété, il a déclaré une hypothèque, mais il n'a pas affirmé qu'il n'y en avait pas d'autres.

Dans le système de la Cour de Révision, la simple réticence du vendeur le rendrait coupable de stellionat.

Et cependant la Cour de cassation avait dit antérieurement: "Attendu que dans le contrat, on peut bien "dire que la vérité n'a pas été déclarée toute entière, "mais qu'on ne voit pas dans cet acte l'affirmation posi-"tive....." Cette réticence du vendeur d'ailleurs, s'ex-

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plique facilement dans le cas actuel ; il n'y avait eu entre les parties que de simples pourparlers pour ainsi dire ; il restait encore aux parties la chance de faire des stipulations au sujet de ces hypothèques, lorsque le contrat serait rédigé et signé.

L'acquéreur avait la facilité de s'éclairer en se faisant délivrer un certificat des hypothèques. Rien n'a été fait dans ce sens ; n'y a-t-il pas eu négligence de la part de l'acheteur ? Il n'a pas même demandé d'explications à son vendeur à ce sujet.

Et cependant c'est contre le vendeur que l'on applique toute la sévérité de la loi. On fournit à l'acquéreur un moyen de spéculation, on lui accorde $300 quand il n'a subi aucune perte, rien souffert, si ce n'est une privation de bénéfices imaginaires. Certes, il nous semble que la Cour de Révision s'éloigne considérablement de la doctrine consacrée dans la cause de *Talbot* v. *Beliveau*. Là, le vendeur avait formellement exprimé une garantie contre toute cause de trouble et d'éviction de quelque nature que ce soit. Mais comme le contrat ne contenait pas la clause de " franc et quitte," la Cour a déclaré que le défaut de faire disparaître les hypothèques n'était pas une cause de demande en résolution de la vente. Où la Cour a-t-elle trouvé, dans l'espèce actuelle, la clause de " franc et quitte ?" Est-ce dans le silence absolu du vendeur ? Nous soumettons humblement que dans le silence du contrat, on ne peut pas présumer une vente avec clause de franc et quitte. Il faut une déclaration, une affirmation du vendeur à ce sujet.

En résumant, nous disons : L'action de l'intimé est fondée sur le refus de l'appelant de faire disparaître de suite les hypothèques grevant la propriété vendue ; or l'appelant n'a jamais pris envers l'intimé l'engagement formel de faire disparaître ces hypothèques avant la rédaction par écrit du contrat. La loi ne lui en faisait pas une obligation. L'appelant n'a donc manqué à aucune de ses obligations envers l'intimé. Ce dernier n'avait droit contre lui à aucune action en dommages pour inexécution d'obligation. Nous ajoutons, le refus de l'appelant de faire dis-

paraître ces hypothèques avant la passation du contrat n'a pas été, en quoi que ce soit, la cause des dommages que réclame l'intimé.

J. S. Hall, for the respondent:—

The case virtually turns upon the construction of the letter from Jones to Ritchie, and the evidence of Gauthier.

From a perusal of this letter, the respondent submits there can be no doubt as to its meaning. The offer of sale is made of the house, the terms are mentioned, and as to these it is stated the "balance, $2,300, mortgage on "ground, can remain as long as buyer requires, or can be "paid off at any time etc." There is no mention made of any other mortgage.

The parties have an interview (no mention made of other mortgages) and the terms of the letter accepted, and appointment made by appellant to sign the deed. Respondent then expected, and maintains yet, he should have a good, free and clear title to the property for his $4,300, and not a title with mortgages for $5,595.

Therefore on this point alone he submits he is entitled to succeed.

If there is any doubt as to the construction of the letter, it is completely removed by Gauthier's own deposition and his own conduct subsequently. Jones had but one set of instructions. In one case he offers the property to one person who accepts it for $4,300; in another case, on the same instructions, a man offers $4,500. The latter is accepted, and deed passed to him as of course. The first purchaser asks for his deed and is refused, and when Gauthier is pressed he tries to adopt a position which his own conduct and answers subsequently belie.

It was argued for the appellant that there was a great difference in the words "good title" or "free and clear," and that neither of these were mentioned in the letter. It was also urged that respondent might have, and ought to have, consulted the Registry Office, and he would there have known about the existence of the mortgages.

As to the absence of the words above referred to, respondent merely asks from the Court a careful perusal of the

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letter and of Gauthier's deposition; and giving words, sentences and conduct their ordinary meaning, he submits his case is wholly made out; and that Gauthier's intention express and implied was the same to him Ritchie, as he Gauthier admits his intentions were to Auld.

Another and perhaps the main point urged by Gauthier's counsel was this. Gauthier having offered to pass a deed in strict accordance with the letter, and the mortgages being not yet due, Ritchie was bound to sign the deed, pay the $1,000, and trust that he, Gauthier, would pay them as they came due.

Such a pretension is untenable, and it would certainly place Ritchie in a very peculiar view. He had undertaken to pay $4,300 for the house. At the passing of the deed he would pay Gauthier $1,000, and still have his property mortgaged for $5,595, and be liable to have the property brought to sale by either or all of three different people. Gauthier in the meantime would have $1,000 in his pocket, which he might have appropriated to his own use and left the limits, and Ritchie would be left without any security.

The respondent admitted at the argument in the Court below that Gauthier might have said: "I am willing to "pass you the deed without any money being paid, and "if I pay off the mortgages now or as fast as they fall "due you must pay me. I will let you keep the money "as security that you will not be troubled by these mort-"gages, or I will insist on your passing a deed and I will "give you security." Such a position would have been tenable, and if Ritchie refused he could not complain, and possibly might be liable to an action. Gauthier did not do this, but strained every point possible to avoid, and did avoid, giving Ritchie a deed.

DORION, Ch. J. :—

The facts are these: Gauthier authorized one Jones, a land agent, to sell a property for him. This agent offered the property to Ritchie on certain terms. Ritchie went to see Gauthier and made a bargain with him, accepting

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the terms proposed for the purchase of the property. At the same time the agent was selling it to another party, named Auld. Ritchie called upon Gauthier to give him a clear title, and said that there was another mortgage besides the one for $2,300. Gauthier would not consent to discharge the other hypothec until it became due; they could not agree, and the property was conveyed to the other party, Auld, for $200 more than Ritchie was to have paid. Ritchie then made a formal demand upon Gauthier for a title.

The question is whether Ritchie was entitled to get a clear title, except as to the $2,300, and to obtain from Gauthier the removal of the mortgage not mentioned in the letter. The Court at St. John's held that Gauthier was not bound to remove the mortgage. The Court of Review reversed this, and condemned Gauthier to pay Ritchie $200, the advance of price obtained for the land from Auld; and $100 for other damages. The whole case turns on the letter from Jones to Ritchie. It is clear from this that the bargain was not then complete. It was an offer; but it was subsequently accepted. The question is whether Jones by mentioning that Ritchie should keep $2,300 to pay the mortgage on the land, meant to say, There is only this one mortgage on the ground, which you shall pay, and keep the money to pay it; and there is no other incumbrance.

The majority of the Court have come to the conclusion to confirm the judgment of the Court of Review, upon the principle we followed in the case of *Grand Trunk Co. & Brewster*.[1] We say that the terms of the letter are equivalent to a clause of *franc et quitte*, and that Gauthier was bound to give the property free from hypothecs, except the one for $2,300.

RAMSAY, J. (*diss.*) :—

This case involves the same question as that in *Grand Trunk Co. & Brewster*, with this difference that there is a letter in these words :—[*See letter cited above.*]

[1] Decided the same day; 6 Leg. News, 34.

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The majority of the Court are of opinion that this letter is equivalent to the clause of *franc et quitte* beyond the hypothec or mortgage indicated. I cannot concur in that opinion. The clause of *franc et quitte* must be express; and therefore I would reverse.

Judgment confirmed, RAMSAY and TESSIER, JJ., *diss.*

DeBellefeuille & Bonin, attorneys for appellant.

Church, Chapleau, Hall & Atwater, attorneys for respondent.

(J. K.)

May 28, 1887.

Coram DORION, CH. J., TESSIER, BABY, CHURCH, JJ.

JAMES A. CANTLIE ET AL.,

(*Plffs. and incid. defts. in Court below*),

APPELLANTS;

THE COATICOOK COTTON CO.,

(*Defts. and incid. plffs. in Court below*),

RESPONDENTS.

AND

E. CONTRA.

Principal and agent—Revocation of agent's authority—Right to indemnity—Prospective profits.

The appellants, commission agents, obtained the selling agency for the product of the respondents' Cotton Mill. As the condition of receiving the agency they were required to subscribe $10,000 in the capital stock of the Company, respondents. No term was fixed, and after the lapse of a year and some months the agency was withdrawn from the appellants. In an action for indemnity by the agents:

HELD (affirming the decision of JOHNSON, J., M. L. R., 3 S. C. 9), that a mandate for which no term has been stipulated is revocable at will, even where the agent has given a consideration for the agency.

2. The revocation, however, is subject to the obligation on the part of the principal to indemnify the agent for any actual loss suffered by him by reason of the revocation of the mandate. The agent's claim to indemnity cannot be extended so as to include loss of profits which he would have made if the agency had been continued, but merely such expenses as he incurred in order to carry on the business, and which, in the particular circumstances of the case, may be seen to have been contemplated at the time the appointment was made.

The appeal was from an interlocutory judgment of the Superior Court, Montreal (JOHNSON, J.), May 28, 1886, reported in M. L. R., 3 S. C. 9.

The *considérants* of the judgment *a quo* were as follows:

"The Court, etc.....

"Considering that the plaintiffs' action is brought to recover from the defendants, damages for having been deprived of the agency to which the defendants had appointed them for the purpose of selling the product of their cotton mills, upon the terms in their declaration alleged;

"Considering that the defendants have pleaded to the said action, in substance, that they did so appoint the plaintiffs their agents upon the condition that they, the plaintiffs, should subscribe $10,000 in the capital stock of the said company, which they never did; that they, the defendants, were by law entitled to revoke at any time at their own pleasure, and without being bound to show cause, the said agency, but that they also had good and sufficient reasons for revoking the same;

"Considering that the defendants also filed an incidental demand for $1,585.09, for certain overcharges in the accounts rendered by the plaintiffs over and above the commissions to which they were entitled, and considering that the defendants filed a further supplementary incidental demand for $1,395.31, for charges for commissions on sales for cash on which a discount was made, and a guarantee commission of 3½ per cent. was nevertheless wrongfully charged;

"Considering that the plaintiffs answered the said pleas and the said incidental demands by averring that they

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had complied sufficiently with the condition of subscribing the said $10,000 stock; that their account sales were regularly accepted without objection until after action brought; that they had a right to allow a discount for prepayment without affecting their guarantee commission; and further by a general denial of the facts alleged by the defendants;

"Considering that the agency in question was not intended to be perpetual and was not made for any determinate period;

"Considering that the subscription for $10,000 stock is also proved, and in fact, admitted as a sufficient compliance with that condition;

"Considering that the plaintiffs entered upon their duties as agents as aforesaid, and the defendants, on the 12th of August, 1881, withdrew and revoked the said agency, as is alleged in the plaintiffs' declaration;

"Considering, first, as regards the principal demand, that by law the plaintiffs had a right to revoke the said agency, and that therefore it is superfluous to inquire whether they had reason for so doing;

"Considering that the said agency was not sold to the plaintiffs for the consideration of the said $10,000 stock;

"Considering that there was no express stipulation between the parties that the agency could not be revoked without indemnifying the agent;

"Considering that although the defendants had by law a right to revoke the said agency as they did, notwithstanding the commissions on sales to which the plaintiffs were entitled, yet that under the circumstances of the present case the plaintiffs would be entitled to be indemnified for any actual loss suffered by them by reason of the said revocation, because, though the law gives them no express right to such indemnity, but on the contrary gave the defendants an absolute right of revocation, the parties were free by law to make any arrangement they chose derogating from such absolute right; that such derogation might be operated tacitly by the nature of the powers conferred upon, and the duties exacted from the

agent, and the nature of the business which might put him to expense and trouble in furnishing and preparing the means of carrying out the mandate;

"Considering that the right to damages for loss of profits *in futuro* which plaintiffs might have made if the agency continued, is inconsistent with the right of revocation in the defendants, and that no other loss or damage has been proved;

"Doth dismiss the said principal demand."

[The judgment proceeds to deal with the incidental demands, as regards which it was ordered that an accountant should report on certain points set forth in detail.]

March 19, 1887.]

R. Laflamme, Q. C., and *John Dunlop*, for the appellants:—

It will be seen that the judgment lays down the principle that agencies, whether gratuitous or given for a valuable consideration, are revocable at the will or pleasure of the mandator.

The judgment held that the subscription for $10,000 stock was proved, and in fact admitted, as a sufficient compliance with the condition under which the agency was given. The judgment also finds that appellants were dismissed from the agency without notice. The judgment seems to qualify the absolute right of dismissal by finding that by the agreement under which the agency was conferred, there was a derogation from the strict principles of mandate, entitling the plaintiffs, in the event of dismissal or revocation of the agency, to claim indemnity for any pecuniary loss or damage sustained by them in preparing the means necessary to sell the product of the mill of the company.

The appellants submit:—

1st. That the agency in question, which is proved and admitted to have been conferred on them on condition of their subscription of $10,000 in the capital stock of the company, could not be revoked at the pleasure of the company. .

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2nd. Even if the agency in question, which is proved and admitted to have been given for a valuable consideration, was revocable at the will or pleasure of the company, yet, there was an absolute agreement derogating from such absolute right of revocation, and under this agreement appellants, if dismissed without cause, had their recourse in damages not limited to reimbursement of actual pecuniary loss sustained, but that they had the right to claim damages for all the loss suffered by them by reason of the breach of agreement under which they were appointed, and that loss of profits *in futuro* could enter into the computation of such damages.

McGoun, for the respondents :—

The respondents submit that the judgment of the Court below should be confirmed for among others, the following reasons :—

1. Because the agency in question was not intended to be perpetual and was not made for any determinate period.

2. Because under the circumstances disclosed, the subscription for stock in the company did not make the agency one revocable only for cause.

3. Because there is no proof of loss directly incidental to the revocation of the agency.

4. Because in any event the respondents have shown ample reason for revocation of the mandate entrusted to the plaintiffs.

5. Because the questions of account involved, justify the reference of the cross and supplementary demands to an accountant.

DORION, CH. J. :—

The appellants claim $10,000, loss of profits and commissions, and a further sum of $5,000 for expenses incurred, and injury to their credit, under the following circumstances. In December, 1879, the appellants made an offer to the Coaticook Cotton Company, to become their selling agents, for the sale of the product of the mill. This offer was accepted in April, 1880, on condition that the appel-

lants should subscribe $10,000 in the capital stock of the company. There was no term fixed during which this agency should continue. On the 6th August, 1881, the appellants' authority was revoked. Under these circumstances they sue for $10,000, loss of profits which they claim they would have made, and further, for $5,000, expenses incurred by them.

The respondents plead to the action that the appellants never complied with the condition which required that they should subscribe $10,000 in the capital stock of the company. This is a singular plea, seeing that the respondents had recognized the agency for more than a year. Moreover, it is proved as a matter of fact that the appellants did subscribe the stock.

The second plea is that the respondents had a right to revoke the appointment of the appellants as their agents, at pleasure.

The principal question, therefore, is whether this agency was revocable whenever the company pleased. The Court below held in the affirmative. There is no doubt that a contract of agency is revocable at the pleasure of the *mandant*; but it is urged by the appellants that this agency was on a different footing; that they gave a consideration for it. We do not think this makes any difference; it only raises the question whether the mandatary is entitled to be indemnified. If the *mandat* be for a stated period, and it be revoked before the expiration of that period, there is a right of damages. An example of this is presented by the case of a clerk who is discharged before the term of his engagement expires. But the present is a different case. The appellants claim $10,000 for profits they would have earned. But as the *mandat* was revocable at pleasure the agents have no right to be indemnified for profits not yet earned. The appellants say, "We gave a consideration for becoming the agents of this company, and the company could not break the bargain." The company apparently wished to have agents who were interested in their enterprise, and they stipulated, as a condition of giving the appellants the selling

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agency, that they should take $10,000 stock in the company. The appellants, however, seem to have obtained full value for this stock, for they disposed of it at par, to Sir Donald Smith and others. We do not think, therefore, that the subscription of stock makes any difference whatever. The claim for $10,000, loss of profits, was properly rejected. As to the $5,000 claimed for loss of credit and expenses incurred, the appellants have proved no expenditure, so they have no claim.

There is an incidental demand for commissions charged by the appellants over and above what they were entitled to charge. The incidental defendants answer that they were entitled to make these charges. Upon this part of the case the Court below ordered a reference to an accountant. The appeal is upon both judgments. The judgment of the Court below is very fully and carefully drawn. We think that this particularly was a case where an *expertise* should take place, and we hold that the judgment upon both demands should be confirmed.

Judgment confirmed.

Dunlop, Lyman & Macpherson,, attorneys for appellants.
Béique, McGoun & Emard, attorneys for respondents.
(J. K.)

May 26, 1886.

Coram MONK, TESSIER, CROSS, BABY, JJ.

JOSEPH N CATY ET AL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

LEON PERRAULT,
(*Defendant in Court below*),
RESPONDENT.

Substitution—Sale of substituted property—Formalities.

HELD:—1. The ordinance of substitutions of 1747, never was in force in Canada; and according to the law which existed in France before the ordinance of 1747, any *grevé de substitution* might, upon judicial authorization duly obtained, alienate the immoveables of the substitution for necessary cause, and to prevent the sale thereof by the sheriff; and such alienation was final;

2. Before the ordinance of 1747, and in Canada before our Civil Code, the consent of the tutor or curator to the substitution, at the sale of substituted property, was sufficient; the concurrence of a tutor to the substitutes then born was not required;

3. The fact that all the relations residing in the district were not summoned to a family council, will not render the proceedings null, where the omission to summon all the relations was not intentional, and no prejudice was caused thereby to the minors;

4. The order of the judge or prothonotary on the advice of a family council covers all antecedent irregularities so as to protect the rights of third parties;

5. Absence of consent by substitutes who were of age at the time of the authorization to sell can be invoked only by themselves in their own behalf, and does not invalidate the sale as regards the other substitutes who were duly represented.

The appeal was from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), Nov. 22, 1884, dismissing the appellants' action. The judgment of the Court below is reported in M. L. R., 1 S. C. 131.

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Mercier, Q. C., for the appellants:—

L'autorisation donnée en 1862 par le protonotaire a-t-elle rendue finale l'aliénation qui s'en est suivie?

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Cette question est de première importance et sa solution devra affecter gravement le résultat du procès. Il importe donc de l'étudier avec prudence et de ne la décider qu'à la lumière des principes de droit applicable dans l'espèce.

I

Cette vente a-t-elle été faite dans les circonstances et pour les raisons pour lesquelles les biens substitués peuvent être aliénés?

Notre Code dit (art. 952): "Le substituant peut indéfiniment permettre l'aliénation des biens substitués; la substitution n'a d'effet en ce cas que si l'aliénation n'a pas eu lieu.

(Art. 953): "L'aliénation finale des biens substitués peut en outre avoir lieu validement pendant la substitution:

1. "Par suite du droit d'expropriation pour cause d'utilité publique, ou d'après quelque loi spéciale.

2. "Par voie forcée en justice pour la dette du substituant ou pour hypothèques antérieures à sa possession. "L'obligation du grevé d'acquitter la dette ou la charge n'empêche pas en ce cas la vente d'être valide à l'encontre de la substitution, mais le grevé demeure passible de tous dommages envers l'appelé.

3. "Du consentement de tous les appelés, lorsqu'ils ont l'exercice de leurs droits. Si quelques-uns d'eux seulement ont consenti, l'aliénation vaut pour ce qui les concerne, sans préjudice aux autres.

4. "Lorsque l'appelé, comme héritier ou légataire du grevé, est tenu de l'éviction envers l'acquéreur.

5. "Quant aux choses mobilières vendues conformément à la section première du présent chapitre."

Ce sont là les dispositions de la loi antérieure au Code et, par conséquent, en force en 1862. C'est l'ordonnance de 1747 reproduite textuellement et qui, elle-même, était une loi déclaratoire.

L'on voit que les immeubles substitués ne peuvent être aliénés que: 1. sur autorisation du substituant; 2. du consentement des appelés; 3. par voie d'expropriation

forcée ; 4. par voie forcée en justice pour dettes du substituant ou hypothèque antérieure à la substitution.

La circonstance mentionnée dans l'alinéa 4 n'autorise pas l'aliénation, mais donne lieu à l'exception de garantie à l'encontre de la demande de l'appelé héritier, question dont nous avons déjà disposé.

Il n'y a pas de telle chose en droit qu'une autorisation judiciaire à l'effet d'aliéner les biens, car ils ne peuvent être l'objet d'une aliénation finale que dans les cas mentionnés dans la loi.

Caty, qui ne pouvait aliéner son usufruit, les testaments prohibant formellement toute aliénation, avait besoin de l'autorisation qu'il a obtenue pour hypothéquer et pour vendre sa jouissance. Et les procédés faits n'ont pas été et n'ont pu aller au-delà. Sans telle prohibition d'aliéner, il aurait pu hypothéquer ou vendre ses droits afin de payer ses dettes (art. 944) ; et cette vente et cette hypothèque eussent été valides (art. 949). Ses créanciers pouvaient même faire vendre par décret ses droits en vertu de telle autorisation ; mais cette vente eût été résolue à l'ouverture de la substitution (arts. 949 et 950).

Ici la vente a été autorisée pour payer les dettes du grevé ; quand les créanciers pouvaient saisir et faire vendre ses droits sans telle autorisation, vu que leur aliénation avait déjà été permise en 1853.

Il est permis de se demander comment des officiers de la Cour, ayant plusieurs juges éclairés auprès d'eux pour les guider et les empêcher d'errer si gravement, ont pu se croire justifiables d'autoriser un procédé aussi étrange, aussi dangereux !

Nous avons cherché dans les auteurs quelque texte non pour justifier, mais pour expliquer cette procédure étrange ; mais toutes nos recherches ont été vaines.

Thevenot d'Essaule (Substitution, ch. 48) donne les cas où le grevé peut aliéner, d'une manière finale, les biens substitués, et ce sont exactement ceux indiqués dans notre Code, aux articles 952 et 953.

Il y a cependant une addition qu'on ne trouve pas dans notre Code ; l'auteur la donne à la section 5, chap. 42, No. 689.

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"Du reste, s'il était intéressant pour la substitution que "des réparations de cette nature (grosses réparations) fus- "sent faites, le grevé aurait la voie de s'adresser à la jus- "tice pour obtenir permission d'hypothéquer ou vendre "des biens substitués, afin de se procurer les deniers né- "cessaires; à moins que les appelés n'offrissent de les "fournir."

Il faut que ce soit *intéressant pour la substitution*; il ne suffirait pas que ce fut *intéressant pour le grevé.*

Merlin reproduit cette doctrine de Thevenot d'Essaule (Substitutions fidéi-commissaires, sect. II, § II, No. 4, p. 396, 2e colonne), mais ajoute un peu plus loin (même section, § III, art. VI, p. 404, 2e colonne):

"Maillard, qui écrivait avant l'Ordonnance de 1747, "dit, dans son Commentaire sur la Coutume d'Artois, art. "74, p. 172, qu'il est de règle générale que les biens fidéi- "commissaires peuvent, à défaut de biens libres, être "aliénés pour cause nécessaire. Cette assertion est jus- "tifiée par quelques arrêts également antérieurs à l'Or- "donnance de 1747."

Et il rappelle trois cas rapportés par Christin & Mean: 1. un appelé condamné à payer le legs fait par le grevé à celui qui l'avait gardé pendant sa dernière maladie; 2. un arrêt déclarant valable l'aliénation d'un bien substitué faite pour fournir aux aliments du grevé; 3. une sentence réservant une pension à un grevé qui entre dans un monastère.

Merlin se demande ensuite ce qu'il faut décider sur tout cela depuis l'ordonnance de 1747. Et il répond: "à "peu près comme du temps de Maillard;" mais il ajoute (p. 405): "il ne faut pourtant pas croire que toutes les "espèces de besoins du grevé puissent lui servir de pré- "texte pour aliéner. Maillard dit qu'on ne doit le lui "permettre que quand il n'a pas de quoi payer sa nourri- "ture, ses vêtements, ceux de sa famille pendant le cours "de la maladie dont il décède, ni sa rançon aux ennemis." Le même auteur ajoute que "les frais funéraires sont "aussi une dette nécessaire." Et venant à l'arrêt du six décembre 1598, dont nous parlions à l'instant, il en limite

la décision " aux seuls aliments fournis durant la maladie, " car, quant aux autres, dit-il, le grevé doit mesurer sa " dépense sur ses revenus, sinon prendre emploi."

Et enfin (au No. 3, p. 405) Merlin fait les remarques suivantes:

" Au reste, on conçoit bien que cette matière, une auto- " risation accordée sans cause légitime, ne fournirait pour " celui qui contracterait en conséquence, avec le grevé, " qu'un titre très-faible et incapable de préjudicier aux " droits des substitués. Maillard (à l'endroit cité, No. " 146), nous en fournit un exemple remarquable: par " arrêt rendu à la grand' chambre, à Paris, le 27 juin 1618, " sur procès par écrit évoqué de Malines, la vente judi- " ciaire, faite par le premier substitué des biens chargés " de fidéi-commis, dans un testament du 18 août 1573, " quoique ce fut en vertu de lettres-patentes par lui ob- " tenues du roi d'Espagne, comte d'Artois, pour payer les " dettes des premiers grevés, a été déclarée nulle; et, en " conséquence, l'acquéreur condamné à se désister et dé- " partir de la possession et jouissance des biens, avec res- " titution des fruits depuis le jour de la demande envers " les héritiers des fidéi-commissaires."

Le célèbre jurisconsulte termine cette étude en disant:

" Les juges ne pourraient plus aujourd'hui accorder de " pareilles autorisations. Le Code Napoléon leur en refuse " le pouvoir, par cela seul qu'il ne leur attribue pas."

La même observation doit être faite sur le compte de nos officiers de cour; *la loi refusait avant le Code* et le Code refuse maintenant aux juges le pouvoir de donner de semblables autorisations, par cela seul qu'ils ne leur attribuent pas.

Pothier (Substitution, 173, Ed. Bugnet, 8 vol., p. 518) demande si *l'aliénation ou l'engagement des biens substitués pourrait être permis dans des cas très-favorables.* Et il répond: oui, pour le cas d'un fils grevé de substitution qui est prisonnier et qui demanderait d'aliéner ses biens substitués pour payer sa rançon. Ce serait, dit-il, *ex praesumpta patris voluntate*, et il ajoute: *qu'il peut se présenter d'autre cas*, mais *qu'on doit être réservé à permettre ces aliénations surtout*

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les premiers juges. "Mais, nous répondent nos adversaires, "c'est bien vrai que la vente a été autorisée pour payer "les dettes du grevé, mais elles furent contractées *en* "*grande partie* pour rebâtir une maison qui avait brûlé et "cela avec autorisation spéciale de la justice ; et la chose a "été faite dans l'intérêt des appelés."

D'abord nous nions que la chose ait été dans l'intérêt des appelés. C'est le contraire qui est vrai, puisqu'ils n'ont maintenant ni bâtisses, ni terrain, et que celui-ci vaut plus que toutes les bâtisses que le grevé y a faites. Ensuite il est établi que le grevé avait déjà aliéné une partie des biens substitues par expropriation et avait reçu $2,200 de la corporation. Avec cette somme, il pouvait bâtir une maison convenable pour se loger. Il n'y avait donc pas nécessité d'emprunter. De sorte que le grevé offre cette consolation aux appelés : "c'est pour améliorer vos biens que je les ai perdus." Ce n'est pas dans de telles circonstances que Ricard permet l'aliénation des biens substitués. "Ainsi les ordonnances ne prohibent-elles "pas toutes les aliénations en général des biens compris "dans une substitution publiée et enregistrée, elles prohi- "bent seulement celles qui sont faites *au préjudice de la* "*substitution* ; et l'on ne peut pas dire que l'aliénation "d'une partie des biens substitués *pour sauver et liquider le* "*reste* soit une aliénation au préjudice de la substitution. "Cependant il serait dangereux d'autoriser de pareilles "ventes sans précaution. Le prétexte de libérer les biens "substitués ouvrirait une porte facile à la fraude si l'hé- "ritier grevé pouvait en abuser impunément pour rendre "la substitution illusoire. La sage prévoyance des lois "y a prévu ; elles ne permettent ces aliénations que sous "deux conditions : la première que *la nécessité soit bien* "*établie.*"

D'ailleurs, Merlin (Rep. vo. Substitutions fidéi-commissaires, sect. XII, § III, art. 1, No. 2, p. 399) décide cette question : "Les choses susceptibles d'aliénation par leur "état sont les immeubles réels qui sont sujets à dépérir, "(c'est-à-dire les maisons caduques et à la réparation ou "reconstruction desquelles les revenus des biens substi-

" tués ne peuvent pas fournir). Lorsqu'il se trouve de " pareils biens dans une substitution, le grevé peut se " faire autoriser par le juge, à vendre, moyennant remploi " du prix qui en proviendra, soit en rentes constituées, " soit en autres immeubles."

Il nous semble que ces autorités démontrent clairement que la vente de 1862 n'a pas été autorisée dans des circonstances qui la justifient et la rendent valide. Il résulte, croyons-nous, de tout ce qui vient d'être dit, que cette vente n'a pas été faite dans les circonstances où l'aliénation des biens substitués est permise et devient finale.

II

Les formalités voulues pour les aliénations ont-elles été remplies ?

L'annotateur de Ricard (des Substitutions, part II, No. 291) est d'opinion que, quand il y a nécessité de vendre des immeubles substitués, il faut observer les formalités prescrites pour la vente des biens des mineurs ; et Thévenot d'Essaule (Subst. note A, p. 266, No. 824) croit *qu'il est prudent d'obtenir*, même pour les ventes faites afin d'acquitter les dettes du substituant, l'autorisation du juge, sur un exposé fidèle des faits. Il ajoute que cette autorisation doit, d'après l'usage suivi en France, être demandé contradictoirement *avec les substitués qui existent* et avec le tuteur à la substitution.

Les deux opinions, quoique différentes dans les termes, sont les mêmes dans le fond.

Il faut le concours du juge, des appelés vivants et représentés par le tuteur s'ils sont mineurs (C. C. art. 945), et celui des appelés non-nés représentés par le curateur à la substitution, lequel doit être nommé avec les formalités nécessaires à la nomination des tuteurs aux mineurs (Code Proc., arts. 1265, 1267 et 1268, C. C. art. 945). Ces tuteurs ne peuvent agir que sur l'avis du conseil de famille, et cet avis, s'il est favorable, n'est accepté par le juge que s'il est satisfait par le compte sommaire qui lui est soumis, que la vente est nécessaire et dans l'intérêt des mineurs et appelés non-nés (C. C. art. 297 et 298, et

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Code Proc. art. 1256). Et enfin l'article 299 ne reconnait cette vente comme valide que si elle est faite en justice et en présence du subrogé-tuteur, au plus offrant sur enchères reçues publiquement.

Quant à l'assemblée des parents, elle doit être convoquée régulièrement, les parents résidents dans le district doivent être assignés et les amis ne peuvent être appelés pour les remplacer que si les parents dûment appelés font défaut (C. C. arts. 251, 252, 253, 254, Code Proc., art. 1258).

Les plus essentielles de ces formalités ont été omises dans le cas qui nous occupe, tant pour les autorisations à contracter les emprunts que pour celles données pour la vente.

1. Pas de tuteur, ni de subrogé-tuteur aux appelés mineurs, malgré que tous les appelants ainsi que deux autres appelés, fussent mineurs.

2. Pas de concours des appelés majeurs qui étaient au nombre de deux à cette époque et présents à Montréal.

3. Pas d'assignation des parents du district, qui, dans la ville seule, étaient au nombre de plus de vingt, parfaitement connus.

Sur ce nombre, deux seulement assistent au conseil tenu en 1853 pour autoriser les emprunts, les autres personnes composant le conseil étant des étrangers ;

4. Pas de compte sommaire pour prouver la nécessité des emprunts et de la vente, et aucune preuve pour appuyer les allégués de la requête ;

5. Les emprunts autorisés pour bâtir deux maisons en brique, l'une à deux étages et l'autre à un étage ; et une seule maison bâtie et en pierre de taille ;

6. La loi 16 Vict., ch. 25 n'autorisait qu'un seul emprunt de £500 par lot ; et ici quatre emprunts de £1,200 sont autorisés pour un seul lot ;

7. Violation de l'ordonnance quant à la remise et l'emploi des argents empruntés et quant à la distribution des prix de vente, des sommes non autorisées étant payées ;

8. Constitution d'une hypothèque non autorisée par le conseil de famille.

Les autorités sont unanimes sur la nécessité de faire représenter l'appelé mineur. Citons les principales : 2 Pigeau, 265. " Lorsque le premier substitué est sous " la puissance paternelle, dans les pays où elle a lieu, et " que le père est chargé de substitution envers lui, l'ordon- " nance des substitutions, titre 2, veut qu'il soit nommé " un tuteur ou curateur, à l'effet de veiller pour lui à la " conservation de la substitution.

"Si le premier substitué n'est pas encore né, cette loi " veut qu'il soit nommé un curateur à la substitution " pour en soutenir les droits.

313. " Lorsqu'il est né (l'appelé), cette ordonnance le " charge seul de défendre les intérêts de la substitution, " en assistant par lui à l'inventaire.

" S'il est sous la puissance paternelle, dans les pays où " elle a lieu, et que le père soit chargé de substitution en- " vers lui, cette loi veut qu'il lui soit nommé un tuteur " ou curateur à l'effet de l'inventaire.

" Si ce premier substitué est pupille, mineur ou interdit, " cette ordonnance exige que l'inventaire soit fait en pré- " sence de son tuteur ou curateur."

Il a été décidé par le juge Berthelot, le 31 mars 1874, C. S., Montréal, No. 2198, *Benoit et al.* v. *Benoit et al.*, 18 *Jurist*, 286, que l'autorisation de vendre des biens substitués était insuffisante " parce qu'elle avait été demandée " par le curateur à la substitution seul, sans l'avoir été " en outre. *aux termes de l'article* 945 du Code Civil, au nom " d'un tuteur *ad hoc* pour représenter les appelés à rece- " voir en vertu de la dite substitution, nés au temps de " la dite autorisation, pour faire procéder légalement à la " vente de l'immeuble affecté par la dite substitution."

Cet article 945 a été amendé depuis par la 38 Vict., ch. 18, qui déclare que le curateur à la substitution représentera les appelés nés et à naître dans tout inventaire et partage ; mais cet amendement n'affecte pas cette cause pour les fins de laquelle l'art. 945 reste dans toute sa force vu qu'il n'est que la reproduction fidèle de l'art. 5 de l'ordonnance de 1747 qui se lit comme suit :

" En cas que le premier substitué soit sous la puissance

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"paternelle dans les pays où elle a lieu, et que le père soit "chargé de substitution envers lui, il lui sera nommé un "tuteur ou curateur à l'effet du dit inventaire ; et si le "premier substitué n'est pas encore né, il sera nommé un "curateur à la substitution qui assistera au dit inven- "taire."

Le curateur à la substitution né représente que les appelés non-nés ; il n'a rien à voir dans les intérêts des appelés nés. Il ne peut empêcher la vente par décret des biens d'une substitution non ouverte. Et, du moment qu'elle l'est, ses fonctions cessent. Ainsi jugé à diverses reprises dans ce pays et notamment dans les causes que voici : *Trust & Loan* v. *Vadeboncœur*, 4 Jur. 358 ; et la cause portée en révision de *Wilson & Leblanc*, 13 Jur. 201.

Ces motifs d'ailleurs ont guidé les codificateurs dans la rédaction de cet article 945 ; et ils les font connaître (p. 194, note sur l'art. 197) dans les termes suivants :

"L'article 197 regarde la nomination, conformément à "la pratique et à la jurisprudence, d'un curateur à la "substitution pour représenter et protéger, tant dans "l'inventaire que postérieurement, ceux des appelés qui "ne peuvent l'être au moyen des tutelles et des curatelles "ordinaires, savoir : les non-nés." (5e rapport).

De tout cela, il ressort clairement que, si la présence d'un tuteur aux appelés mineurs est nécessaire pour un inventaire et un partage, *a fortiori*, l'est-elle quand il s'agit de l'aliénation finale des immeubles substitués.

Nos cours ont toujours exigé avec rigueur l'accomplissement de toutes les formalités voulues pour les ventes des biens de mineurs. *Vide Poustie* v. *McGregor*, 9 Jur. 332, 16 avril 1851, et *Béliveau & Chevrefils*, 2 Q. L. R. 191, appel 5 sept. 1876. Dans cette dernière cause le juge-en-chef, rendant le jugement de la Cour, prononça les paroles suivantes :

"Il est évident qu'il n'y a pas d'urgence de vendre les "immeubles des mineurs, qui ne doivent, dans tous les "cas, être vendus que lorsqu'il y a nécessité de le faire. "La loi veille d'un œil jaloux sur la conservation des "biens et surtout des immeubles des mineurs. Il faut

" de très-fortes raisons pour en autoriser l'aliénation, et " dans l'espèce, ces raisons n'existent certainement pas..... " Il n'y avait donc pas de raisons suffisantes pour auto- " riser l'aliénation des immeubles de la succession et, pour " cette raison, le jugement de la Cour inférieure doit être " infirmé et l'autorisation de vendre être annulée."

Quand il s'agit d'une simple transaction, le grevé ne peut le faire de manière à obliger l'appelé, si ce n'est dans le cas de nécessité où l'intérêt de ce dernier est concerné, et après y avoir été autorisé en justice pour la vente des biens des mineurs (art. 951). Ces formalités sont indiquées aux arts. 297, 298 et 299 du Code Civil et 1267 et 1268 du Code de Procédure.

C'est l'opinion de Ricard qui dit: " Dans une position " si critique, quoique je ne connaisse aucun règlement " qui prescrive des formalités particulières à l'héritier " grevé qui veut vendre des biens substitués *pour payer* " *les dettes ou charges auxquelles ils sont affectés*, je crois que " la *prudence* lui fait une loi d'observer *à peu près* les for- " malités établies pour l'aliénation des biens des mineurs. " Denizart et Thévenot D'Essaule attestent *que tel est* " *l'usage du chatelet* et j'en ai un exemple tout récent sous " les yeux."

Pour toutes ces raisons, il est permis de conclure que les autorisations et aliénations invoquées n'ont aucune valeur en loi, à l'encontre des droits des appelants, et qu'elles ne sauraient rendre finale la vente du 2 mai 1862, sur laquelle l'intimé base ses prétentions.

Laflamme, Q. C., and *Lacoste*, Q. C., for the respondent :—

Première question.

L'aliénation qui a été faite de l'immeuble en litige est-elle valide ?

Les demandeurs ne peuvent invoquer comme moyens de nullité que ceux qu'ils ont spécialement allégués dans leur action. Ces moyens sont en résumé : 1. Que l'autorisation à vendre est irrégulière, illégale et n'a pas été accompagnée des formalités voulues par la loi. 2. Que les actes d'autorisation et de vente démontrent que le prix

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de vente de l'immeuble a été employé à acquitter les dettes personnelles de Louis Caty, le grevé.

Le premier moyen n'équivaut qu'à une allégation d'absence complète et omission totale des formalités requises pour obtenir une autorisation à vendre. Si les appelés eussent voulu invoquer l'absence ou l'omission d'une formalité en particulier, comme, par exemple, une irrégularité dans la convocation du conseil de famille, l'absence des parents, etc.; ils auraient dû l'alléguer spécialement. Cette absence ou omission totale de formalités est contredite par l'homologation même de l'avis du conseil de famille, homologation qui est un jugement créant une présomption *juris* de l'accomplissement des formalités.

Le second moyen est également contre-prouvé par les actes d'autorisation et de vente.

La simple lecture des procédures sur l'autorisation à vendre, document 19, démontre qu'elle était donnée pour acquitter ce que la Cour considérait être des dettes dont était tenue la substitution, et que la justice avait en vue une vente finale et non résoluble à l'ouverture de la substitution. Sur ce point comme sur le précédent, le jugement d'homologation crée en faveur de l'adjudicataire une présomption qui ne saurait être attaquée aujourd'hui. La justice a déclaré qu'elle autorisait la vente dans l'intérêt des grevés et des appelés, et qu'elle transférait la propriété à l'adjudicataire sur paiement de certaines charges qui grevaient la propriété et de certaines dettes qu'elle a déclarées, après mur examen, être celles de la substitution. N'est-ce pas là pour les appelés, chose jugée? Autrement où serait la garantie des acquéreurs?

Ne peut-on pas, dans l'espèce, invoquer la règle contenue dans l'article 959 du Code Civil, qui veut que les jugements en faveur des tiers, lient les appelés, si le curateur à la substitution a été mis en cause? Dans le cas actuel le curateur à la substitution s'est joint au grevé pour demander la vente.

Mais, allant plus loin et supposant, pour l'argument, que l'intimé soit tenu de justifier du droit du grevé d'obtenir l'autorisation à vendre, et de l'accomplissement des

conditions exigées pour la vente, nous soumettons que ce droit existait, et que les conditions exigées ont été remplies.

Il a de tout temps été reconnu qu'un immeuble grevé de substitution pouvait être vendu pour des dettes qui sont des charges de la substitution. Merlin, Répertoire, *Verbo* Substitution fidéi-commissaire, section XII, paragraphe 3, article 2. 2 Ricard, Substitution, tome 3, chapitre 15, numéro 153. Thévenot D'Essaule, chapitre 50, numéro 821 et suivants. Lacombe, *vo.* Substitution, XX Part. 2, sect. 11, Dist. 8, numéro 2. Voet, volume 3, Livre 36, Titre I, numéro 61. *McIntosh & Bell*, 12 L. C. J., p. 121. Code Civil, articles 951 et 953.

C'est la règle qui prévaut en fait de droit de douaire, Un tiers acquéreur ne peut être troublé par le douairier si le prix a servi à désintéresser une créance antérieure au douaire. Code Civil, article 1447. *Ubi eadem ratio ibi idem jus.*

Le prix de la vente a été employé à payer :—1. La commutation seigneuriale de la propriété ; 2 Des taxes municipales ; 3. Les arrérages de la rente due à Thaïs Caty ; 4. Le Trust & Loan.

La commutation et les taxes municipales sont des charges privilégiées qui priment le droit des appelés.

La rente de Thaïs Caty a été créée par le partage entre les enfants de François Caty, partage qui a été ordonné par le testament même qui a créé la substitution.

La dette due au Trust & Loan était pour la construction des bâtisses. Ces bâtisses étaient spécialement affectées en vertu de la loi précitée, 16 Vict., ch. 2, au paiement de cette dette.

De plus, une hypothèque conventionnelle avait été consentie, sur autorisation en justice, par Louis Caty en faveur du Trust & Loan.

La Cour ne peut examiner la légitimité ou la légalité de cet emprunt effectué du Trust & Loan, l'autorité a déclaré que le grevé pouvait vendre et pouvait engager les biens substitués et ainsi lier les appelés.

Les appelants ne demandent pas par leur action la

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révocation ou l'annulation de cette ordonnance, laquelle constitue une fin de non recevoir contre toute revendication.

Il y avait donc juste cause pour l'adjudication finale de l'immeuble.

Maintenant les conditions voulues pour la vente des biens substitués ont-elles été remplies?

Il est à remarquer que sous l'ancien droit, il n'existait aucune formalité de rigueur. Voir autorités précitées.

Il suffisait de justifier de la juste cause.

Comme nous l'avons dit, aucune informalité n'est spécialement invoquée dans l'action; seulement à l'argument, on s'est appuyé sur deux motifs:

1o. Les appelés nés n'avaient pas été consultés et n'étaient pas représentés lors de l'autorisation à vendre.

2o. Le conseil de famille n'était pas entièrement composé de parents, et il y avait des parents dans Montréal qui n'avaient pas été convoqués.

Le premier moyen invoqué par les appelants est basé sur l'article 945 du Code Civil, qui est invoqué comme loi existant antérieurement au Code.

D'après cet article, le tuteur ne représente pas les appelés à naître; les appelés nés et incapables sont représentés comme dans les cas ordinaires.

Cet article n'est pas l'écho fidèle de la jurisprudence antérieure au Code. Les codificateurs, dans leur cinquième rapport, page 40, remarquent que l'on a souvent étendu la curatelle à toute la substitution, mais ils suggèrent qu'elle soit limitée aux appelés non nés, et c'est en conséquence que l'article 945 de notre Code a été rédigé et adopté, laissant aux appelés nés le soin de surveiller leurs droits, soit par eux-mêmes, s'ils étaient capables, soit par leur tuteur, leur curateur, etc., s'ils étaient incapables.

Il est incontestable qu'avant le Code, la jurisprudence a reconnu le droit du curateur à la substitution pour les appelés nés aussi bien que pour les appelés à naître.

Castonguay & Castonguay, 14 L. C. R.

Trust & Loan v. *Vadeboncœur*, 4 L. C. J., p. 358.

L'acte de Québec, 38 Vict., ch. 13, rétablit le droit antérieur au Code, en décrétant que tous les appelés nés et à naître seront représentés par le curateur à la substitution, c'est-à-dire que le curateur à la substitution est redevenu ce qu'il était autrefois, un légitime curateur.

Merlin, Substitution fidéi-commissaire, section II, paragraphe 6, page 516. Thévenot D'Essaule, ch. 48, sect. 7, No. 790, page 427.

Notre Code n'exige pas que les appelés soient représentés dans l'aliénation d'un immeuble.

L'article 951 dit :—"Le grevé ne peut non plus tran-"siger sur la propriété des biens de manière à obliger "l'appelé, si ce n'est dans les cas de nécessité où l'intérêt "de ce dernier est concerné, et après y avoir été autorisé "en justice comme pour la vente des biens des mineurs."

L'article 953 détermine ces cas de nécessité. L'article 956 permet aux appelés de faire des actes conservatoires avant l'ouverture de la substitution, mais, outre que, dans l'espèce, il n'y a eu aucun procédé conservatoire de fait, il faut convenir que les anciens auteurs étaient contre cette opinion.

Thévenot D'Essaule, Substitution, No. 75, et les anciens auteurs ne reconnaîtront pas un tel droit.

Aussi *Trust and Loan* v. *Vadeboncœur*, 4 L. C. J., p. 358.

Le second moyen invoqué par les appelants, c'est que des parents, au nombre de sept, n'ont pas été appelés au conseil de famille, et la preuve n'établit pas positivement qu'il y avait des parents présents à Montréal ou dans le district de Montréal, autres que ceux qui ont formé le conseil de famille.

La présomption est que les formalités ont été remplies. Il y avait six parents de présents sur sept, et ils étaient unanimes.

A la différence du Code français qui veut que l'autorisation soit donnée par le conseil de famille, le Code Napoléon, article 457, et 7 Demolombe, numéros 189, 190, 191 231 et 232, dit que c'est le juge ou le protonotaire qui donne l'autorisation. Code Civil, article 297.

Cependant, même en France, la jurisprudence n'admet

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pas de délibérations pour simple violation des prescriptions établies par le Code. 7 Demolombe, numéros 323, 328 et 329. Sirey, 1848, 1 partie, p 177. Sirey, 1848, 2 partie, p. 157. Supplément de Gilbert, article 407. Rivière, Jurisprudence, p. 217, numéro 108. Revue Critique, volume 1, page 175.

Aucune nullité n'est prononcée par la loi, et la Cour ne peut y suppléer quand elle ne peut baser son jugement en nullité sur une fraude ou une injustice réelle.

May 26, 1886.]

BABY, J., delivering the judgment of the Court, was of opinion that the appeal should be dismissed for the reasons set forth in the judgment of the Court below.

Judgment confirmed.

Mercier, Beausoleil & Martineau, attorneys for appellants.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for respondent.

(J. K.)

March 27, 1886.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

THE CENTRAL VERMONT RAILWAY CO.,
(*Petitioners in Court below*),
APPELLANTS;

AND

THE TOWN OF ST. JOHN'S,
(*Respondents in Court below*),
RESPONDENTS.

Railway bridge and railway track—Assessment of—40 *Vict.* (*Q.*), *ch.* 29, *ss.* 326, 327—*Injunction—Extension of town limits to middle of navigable river*—43-44 *Vict.* (*Q.*) *c.* 62.

HELD:—1. That the clause in the Act of Incorporation of the town of St. John's, P. Q., extending the limits of the town to the middle of the Richelieu river, which is a navigable river, is *intra vires* of the local legislature.

2. That the portion of the railway bridge built over the Richelieu river, and the railway track of the company appellants, within the limits of the town of St. John's as above defined, are subject to taxation by the municipality as well as the land on which the bridge and track are constructed.

The appeal was from a judgment of CHAGNON, J., Superior Court, district of Iberville, March 10, 1885, in the following terms:—

"Après avoir entendu les parties, requérante et défenderesse par leurs avocats, tant sur l'exception à la forme produite par la défenderesse que sur la défense en droit et les défenses au mérite produites par la même défenderesse, le défendeur F. X. Lanier ayant déclaré s'en rapporter à justice; après avoir examiné la preuve, les pièces produites, la procédure du dossier, et avoir sur le tout murement délibéré,

"Je, soussigné, un des juges de la Cour Supérieure de la province de Québec, siégeant dans et pour le district d'Iberville, en chambre,

"D'abord, quant à l'exception à la forme,

"Considérant que les moyens d'exception à la forme invoqué par la défenderesse ne sont pas fondés;

"Considérant que l'ffidavit du nommé I. B. Futvoye, souscrit au bas de la requête libellée annexée au bref d'injonction en cette cause, est suffisant et en accord avec l'article 1023 du Code de Procédure tel qu'amendé;

"Considérant que le dit affidavit n'est pas fondé sur une simple croyance du déposant, non plus que sur de simples informations à lui fournies; mais considérant que le déposant, par son dit affidavit, jure de la vérité des faits allégués dans la dite requête, au meilleur de sa connaissance personnelle;

"Considérant que le bref d'injonction en cette cause a été rapporté au temps fixé devant le juge en chambre, et que les parties ont régulièrement comparu devant le juge en chambre;

"Maintient la contestation faite de la dite exception à la forme, et renvoie la dite exception avec les dépens accrus sur icelle contre la défenderesse, lesquels dépens sont distraits à, etc.

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"Et quant à la défense en droit et au mérite,

"Considérant que la section quatrième de l'acte d'incorporation de la ville de St-Jean, 43-44 Vict., chap. 62, n'est pas inconstitutionnelle, et que la législature de la province de Québec n'empiétait pas sur les pouvoirs du Parlement du Canada en l'édictant ;

"Considérant que la rivière Richelieu, comme étant une rivière navigable, était bien, quant à son lit et à ses eaux, sous le contrôle des autorités fédérales, pour les fins du commerce et de la navigation ; mais considérant que les constructions privées ou particulières érigées au-dessus du lit et des eaux de la dite rivière, avec l'assentiment des autorités fédérales, ne devenaient pas pour cette raison, partie du domaine public, comme l'étaient le lit et les eaux de la dite rivière, mais restaient propriété privée, sous le contrôle de leur propriétaire ;

"Considérant que la législature de Québec pouvait constitutionnellement inclure aucune portion d'une rivière navigable dans les limites d'une municipalité, pour des fins d'administration et de gouvernement municipal ; et considérant qu'en conséquence toutes constructions ou toutes parties de constructions érigées au-dessus des eaux d'une telle rivière, pour des fins d'exploitation privée, se trouvaient constitutionnellement et légalement comprises, pour les fins d'administration municipale dans le territoire de la municipalité incluant le tout ou portion de la dite rivière ;

"Considérant qu'ainsi la requérante n'avait pas raison dans l'espèce de prétendre que son pont traversant la dite rivière Richelieu d'une rive à l'autre, n'était, pour aucune de ses parties, dans le territoire de la municipalité de la ville de St-Jean, parce que tel pont était construit au-dessus d'une rivière navigable, et que l'acte d'incorporation de la dite ville n'avait pu constitutionnellement inclure aucune portion de la dite rivière sous le gouvernement municipal de la ville de St-Jean ;

"Considérant qu'ainsi l'excès de pouvoirs reproché par la requête libellée de la requérante, à la corporation de la ville de St-Jean, relativement et à propos de la taxation

qu'elle a faite de la moitié du dit pont, pour les fins municipales, n'existe pas ;

" Considérant qu'en conformité à son acte d'incorporation, la corporation de la ville de St-Jean avait le pouvoir de taxer pour les fins municipales tous immeubles se trouvant dans les limites de son territoire, moins ceux spécialement exemptés ; et considérant qu'ainsi la dite corporation par son conseil avait le pouvoir d'asseoir une taxe sur la partie du dit pont se trouvant dans les limites de son dit territoire ;

" Considérant que la requérante pouvait bien, suivant le mode prescrit par le dit acte d'incorporation, discuter l'évaluation faite du dit pont par les évaluateurs ; mais considérant qu'il n'y avait dans cette évaluation ainsi faite sous l'action des autorités municipales, aucun excès de pouvoirs ;

" Considérant qu'il appert également par la charte de la corporation de la ville de St-Jean, que cette dernière avait le pouvoir de taxer pour les fins municipales, non-seulement les personnes et les propriétés mobilières dans la municipalité, tel que l'allègue la requérante dans sa requête, mais qu'elle avait aussi le pouvoir par sa dite charte, de taxer les propriétés immobilières, que ces propriétés fussent des biens-fonds ou des bâtisses ou constructions ; et considérant qu'ainsi la dite corporation avait le pouvoir de taxer la partie ci-dessus du dit pont, lequel constituait ce que la loi appelle une propriété immobilière ;

" Considérant que la corporation de la ville de St-Jean avait également le pouvoir, sous la dénomination d'immeubles dans la municipalité, de taxer la partie des voies ferrées de la requérante, appartenant ou en la possession de la requérante, dans les limites de la municipalité ; et considérant que la dite corporation n'a pas en conséquence outre-passé ses pouvoirs en taxant comme elle l'a fait les voies ferrées (*railway tracks*) de la requérante, dans les limites de son territoire, non plus que la bâtisse aussi située dans les limites de la dite municipalité, et occupée par la requérante, comme bureau ou office ;

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"Considérant qu'ainsi la corporation de la ville de St-Jean ayant agi au regard de telle taxation, dans les limites de ses attributions, en vertu de sa charte, et n'ayant rien fait d'*ultra vires* quant à ce, n'a pu légalement devenir sujette à l'exercice contre elle d'un bref d'injonction, en vertu du Statut 41 Vict., chap. 14 (Q.), non plus qu'à ses conséquences;

"Considérant que la requérante, par sa requête libellée, se plaint en sus de l'excès de pouvoirs reproché, de l'exagération de l'évaluation placée sur ses propriétés par les évaluateurs; mais considérant qu'en supposant qu'il y aurait eu exagération dans l'évaluation faite de ses propriétés par les dits évaluateurs, telle exagération n'eût pu, en vertu du Statut sous l'opération duquel la requérante procède,—41 Vict., chap. 14—donner lieu à l'émanation d'un bref d'injonction;

"Considérant que la requérante avait d'autres remèdes que le bref d'injonction pour régler et discuter cette question de valeur; et considérant qu'ainsi le bref d'injonction émané en cette cause n'est pas fondé et doit être cassé et annulé;

"Maintient les dites défenses, et casse et annule le dit bref d'injonction, et renvoie la dite requête libellée avec dépens, distraits, etc."

Jan. 19, 1886.]

Church, Q. C., for the appellants:—

The facts and circumstances connected with the case are as follows:—

The Central Vermont Railway Co., a body corporate, on the 19th of December, 1884, presented a petition (*requête libellée*) praying that a writ of injunction should issue addressed to the respondents, enjoining upon them to suspend all proceedings upon a certain warrant of execution issued by the said Corporation of the Town of St. Johns, against the appellants, for the collection of certain taxes, until such time as a further order should be made, and praying also that the seizure or execution, and all proceedings relative thereto, and Acts in virtue of which taxes had been imposed against the appellants, be

declared illegal, null and of no effect, and be annulled. This proceeding was taken under the provisions of the Act of this province, 41 Vict. cap. 14.

The Corporation of the Town of St. Johns pleaded *first*, by a motion to quash ; *secondly*, by an *exception to the form ; thirdly*, by a *défense en droit*, and *fourthly*, by a *défense en fait*. The other defendant submitted himself to the decision of the Court without pleading, and from that time practically ceased to be connected with the case.

A judgment, on the motion to quash, was pronounced on the 21st of January, 1885, by Chagnon, J., dimissing it.

The issues having been closed upon the *exception à la formé*, *défense en droit*, and other pleadings of the defendant, and the parties having gone to proof on the merits, on the 10th March, 1885, the same judge rendered the judgment set forth above.

It will be seen that the petition of the appellants was dismissed upon the merits, and the object of the appeal is to have this judgment set aside, and the writ of injunction maintained.

In order to investigate this case it is necessary to examine carefully the organic statute under which the respondents were permitted, and themselves professed, to exercise their powers over the appellant. This statute is the 43-44 Vict., cap. 62 of the Acts of the Province of Quebec. The preamble of the Act recites various statutes, to wit, 22 Vict., cap. 106,— 31 Vict., cap. 49,—37 Vict., cap. 45,—39 Vict., cap. 48,—as the original organic statutes for the incorporation of the Town of St. Johns and the amending Acts.

The first section of the new statute 43-44 Vict., cap. 62, repeals all the Acts above recited, and replaces them by the Act in question. It moreover does not merge the old corporation in the new one, transfer its assets, continue its powers, or by confusion or otherwise, except as hereinafter explained, continue the existence of the old corporation in any manner whatsoever, but on the contrary, extinguishes it at once and forever, and alters its boundaries and area and gives new ones. Thus it will be seen that

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in the investigation of the powers enjoyed by the respondent, they are to be found wholly within the four corners of the Act 43-44 Vict., cap. 62, Quebec. This Act creates the Corporation, describes its boundaries, provides for the corporate officers, declares the powers which the Corporation shall possess, and defines them, and is in fact so complete within its scope and provisions, that no necessity whatever remained for continuing in force the Acts which are replaced, so far at least as the future conduct of the affairs of the Corporation was concerned.

We propose to show in what follows, that this Corporation "acted and took proceedings beyond its powers and "without having fulfilled the formalities prescribed by "law and the Act incorporating it."

As will be gathered from the judgment, on the 17th March, 1884, the Mayor of the Town of St. Johns, issued a warrant addressed to the co-defendant, Francis Xavier Lanier, in his capacity of one of the bailiffs of the Superior Court for the district of Iberville. On reference to this document it will be seen that it required him, in conformity with the provisions of section 100 of the Act 43-44 Vict., cap. 62, to collect the sum of $559.66, capital, interest and costs due the respondents for municipal taxes, as appeared by the collection roll of the said Corporation for the years 1880-81-82-83.

It will be seen that the warrant issued contemplated the forced collection of taxes four years in arrears. We propose, in the first place, to show that no authority whatever existed for collecting the taxes claimed as due in 1880, by showing that it was impossible for any such taxes to have been legally imposed during that year under the Act now in question, or collected under such Act however imposed; and if we succeed in doing so we respectfully submit that the issue of the warrant was without lawful authority and beyond the powers of the respondent.

If any taxes were legally imposed that year they must have been so imposed either by virtue of the Acts in force prior to the passage of the Act 43-44 Vict., cap. 62, or in

virtue of the last-named Act. If they were imposed under the provisions of the Acts passed prior to the last named Act, these Acts were repealed from and after the 24th day of July, 1880, and no provision whatever is contained in the Act 43-44 Vict., cap. 62, to continue in force the collection roll after the repeal of the said Acts, nor to enable proceedings to be taken to enforce the collection of any taxes previously imposed by virtue of any antecedent legislation, and certainly not anything to justify the issue of a warrant *de plano* without notice to the party affected or without an opportunity being afforded him of being heard. This disposes at once of the pretension that any taxes whatever could be enforced under preceding legislation, or indeed that any remained due to the new corporation. It now remains only to be seen whether any taxes could be legally imposed for the year 1880 by virtue of the authority conferred by the 43-44 Vict., cap. 62.

On this point we observe in the first place that the only section whatever of the last-named Act which alludes in any manner whatsoever to a continuing authority is to be found in section 7 of said Act. By it the Mayor and Councillors of the said town then in office should remain, and were thereby continued in their respective offices during the whole term for which they were elected, and the officers appointed by the Council were also to remain, and were thereby continued in their respective offices until duly removed therefrom by the Council or the expiration of their functions, and it was also provided that all "by-laws, ordinances, agreements, stipulations, and engagements" whatsoever, passed by the said Council or the then present Mayor or their predecessors in office, should have and continue to have full and entire effect until such "by-laws, agreements, and engagements," should be duly rescinded and abolished.

It will be observed at once that whilst "by-laws, agreements and engagements" were to continue in force and effect, no provision whatever was made for the continuing in force of any collection rolls, as the issuing of any writ of the character of the one issued by the new corporation,

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for the enforced collection of debts due the old corporation. Moreover, it was impossible that any successors could be elected to fill the offices occupied by the Mayor and Councillors of the Town until the month of February in the year 1881, because section 18 of the said Act, 43-44 Vict., cap. 62, provided that the nomination for municipal elections should take place in the month of February in each year, and as the month of February in the year 1880 had passed before the Act came into force, it is manifest that no election could take place until the succeeding year; besides, no assessment could be validly made until the month of April of the succeeding year 1881, inasmuch as section 76 of the Act 43-44 Vict., cap. 62, only provided for the appointment of assessors at the sittings of the Council in the month of April, and until such were named, no legal or valid valuation roll could be made.

As respects the other items of the account or claim set forth in the warrant (without impugning for the moment the validity of the assessments under which they exist), it is, perhaps, sufficient to point out to the Court that each of these items is accompanied with a claim for interest upon it, the whole of such interest claim, amounting to $53.53, and it is respectfully submitted that the powers conferred upon the Corporation under sections 100 and 101 must be strictly construed by the Courts, since they are inconsistent with all ordinary ideas of constitutional rights, as guaranteed by Magna Charta and universally observed by all British Courts of justice until the innovation of making collection rolls *titres exécutoires* was introduced; we refer to those rights by which the impleaded party had a right to appeal to the judges of the land, as a tribunal which investigated and granted a hearing before it condemned. Sections 100 and 101 do undoubtedly authorize the issue of a warrant for taxes, but they do not justify the issue of such warrant for arrears of interest, and especially as in this case interest for several years.

But besides these reasons, another reason of an equally formidable character existed, and it is the one which is especially set forth in the petition for the writ, and con-

sidered in the judgment, namely, as to whether the Act 43-44 Vict., ch. 62, fixing the eastern boundary of the corporation of St. Johns, at an imaginary line, passing at the middle of the Richelieu River, was or was not *ultra vires* of the legislature of the Province of Quebec, and unconstitutional, and whether the respondents had any authority or power to tax that part of appellants' bridge, which they alleged was within the boundaries assigned to the Town of St. Johns by the Act 43-44 Vict. chap. 62.

The Civil Code of the Province of Quebec, Art. 400, declares that navigable and floatable rivers and their banks are dependencies of the Crown domain, and Art. 399 declares that property belonging to the Crown is governed by public or administrative law. The B. N. A. Act, 1867, declares, by sect. 91, that the exclusive right to make laws for the peace, order and good government of the Dominion of Canada, is vested in the Parliament of Canada, and to the exclusion of concurrent legislative power by the Legislatures of the Provinces, as regards navigation, and the Act 31 Vict., cap. 7, sec. 10, Quebec, declares in effect, that no Article of the Civil Code shall be repealed by any Act of the Legislature, unless such Act enumerates the article which it purports to repeal. The Legislature of Quebec, by the said 4th section of the Act 43-44 Vict., cap. 62, assumed the power to confer municipal control for all the purposes mentioned in the said Act, and especially (by sections 114-15-16), rights of taxation and forced expropriation, and of eminent domain, which it is respectfully submitted the Legislature of Quebec could not itself exercise as respects a stream like the River Richelieu, notoriously a public and navigable river. It is also respectfully submitted that the attempt to tax the one-half of the bridge in question, which lay between the middle of the said stream and the bank of the Richelieu River adjacent to the Corporation of St. Johns, was not even authorized by the Act 43-44 Vic., cap. 62, or if authorized was not exercised in a manner contemplated by that Act. It was not authorized because no "obligations or engagements" existing on the part of the Corporation which was

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replaced by the one created by this Act, if any existed, was continued over or imposed upon the new Corporation, nor has it been shewn that any new ones had been incurred; and moreover the Town Council could only tax "lands, town lots and parts of town lots with the buildings and erections thereon," (vide sec. 86, sub-sec. 1) and it is submitted that the bridge in question was not an erection upon any lands, town lots or part of a town lot within the Corporation, or which could be thereon placed by any legislative enactment of the Legislature of the Province of Quebec; and besides, as we have said, even admitting that the power to tax existed, it was not exercised in the manner contemplated by the Act in question, because the only manner in which the Corporation could be taxable (if at all) would be under the provisions of the 87th section, where authority is given to tax "callings," and it is submitted that the only method by which the appellants could have been reached, if at all, would have been by a tax on its calling, and that this power should have been exercised not by assessment and valuation through assessors, but by by-law as provided by section 87, of the Act 43-44 Vic., cap. 62.

This strict view of the powers of this Corporation will be found justified on reference to Dillon on Municipal Corporations, Vol. I, p. 89, second edition, wherein he says:—

"The Courts too have duties, the most important of "which is, to require these Corporations in all cases to "show a plain and clear grant for the authority they "assume to exercise; *to lean against constructive powers, and "with firm hands to hold them and their officers within chartered "limits.*" And again at page 121 the same authority says: —"When it is remembered that the charter of such a "Corporation is its constitution and gives it all the powers "it possesses (unless other statutes are applicable to it) its "careful study in any given case is indispensable to an "understanding of the nature of the powers it confers, "the duties it enjoins, and liabilities it creates. The con-"struction of its various provisions, and the determination

"of the relation which these bear to the general statutes of "the State; how far the charter controls, or how far it is "controlled by other legislation, are among the most dif- "ficult problems which perplex the lawyer and the judge. "The study of a question of corporation law begins with "the charter, but it must oftentimes be pursued into the "general statutes and legislative policy of the State, and "after this into the broad field of general jurisprudence." It is respectfully submitted that the general jurisprudence of the country does not sanction the assumption of authority by the Provincial Legislature over the beds of navigable rivers, nor the permissive authority to plant piers in their beds, nor the erection of structures over their waters, nor the extension of corporate rights over the river beds, nor artificial erections upon them, whether for taxation (local revenue or municipal revenue), but that such streams are under the control of the public law of the Empire; that the navigability (which includes their beds and banks) is a trust of the Parliament of the Dominion of Canada, and that any attempt to invade this power under the guise of conceding municipal or corporate authority is as illegal as it is dangerous, and the natural extension of such powers or the attempt to enforce them in the manner and to the extent of the Act in question, 43-44 Vict., cap. 62, might and probably would ultimately lead to conflicts of jurisdiction and the submission of the rivers of the Province to the control of municipal or civil law as contra-distinguished from the public law of the country.

As respects the valuation rolls, the illegality of which is also attacked upon the ground that they assessed appellant for property which it did not own or possess, and which the respondents knew was owned or possessed by others, and this, notwithstanding the protest of the appellants, it is respectfully submitted that the evidence establishes the appellants' contentions; and finally it is submitted that if no valid objections existed for any of the reasons hereinbefore assigned, it is manifest the bailiff (co-respondent) illegally executed the warrant in

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that under the warrant he was authorized and directed to seize the goods and chattels of the alleged debtor, whereas it appears that he seized an engine and tender belonging to the appellants, and in its possession; the appellants being a railway corporation and its engine with tender attached a part of the road, it was and is an immoveable by destination, and as such was not seizable under the exigency of the warrant with which Lanier (co-respondent) was charged in this cause.

Robidoux, for the respondents :—

L'appelante était requérante devant la Cour Supérieure, siégeant dans le district d'Iberville, sur une procédure par voie d'injonction contre l'intimée.

Par sa requête l'appelante allègue :

Que des biens meubles ont été saisis à la demande de la ville de St-Jean, poursuivant le recouvrement d'une somme de $559.76, que lui doit l'appelante pour taxes par elle imposées pour les années 1880, 1881, 1882 et 1883, sur les immeubles dont l'appelante est propriétaire et occupante dans la ville de St-Jean et particulièrement sur la moitié du pont qui traverse la rivière Richelieu, dont l'appelante est locataire et sur lequel elle fait circuler ses trains ;

Que l'intimée n'a aucun droit de prélever une taxe sur les biens de l'appelante, pour entre autres raisons les suivantes, qui sont les seules de quelqu'importance :

1o. Parce que le dit pont qui traverse la rivière Richelieu n'est pas situé dans les limites de la ville de Saint-Jean, et que la clause de l'Acte d'incorporation de la ville de Saint-Jean, qui fixe au milieu de la dite rivière Richelieu les limites de la ville de Saint-Jean, d'un côté, est *ultra vires*, vu que cette rivière, qui est navigable, est sous le contrôle exclusif du gouvernement fédéral ;

2o. Parce que d'après la clause 86e de l'Acte d'incorporation de la ville de Saint-Jean (43-44 Vict., c. 62) l'intimée n'a pas droit de prélever de taxes sur les immeubles et les terrains occupés par l'appelante dans les limites de la ville de Saint-Jean. Ainsi, le pont qui traverse la

rivière Richelieu, étant un immeuble, ne pouvait être sujet à une taxe au profit de la ville de Saint-Jean ;

3o. Parce que la cotisation imposée par la ville de Saint-Jean est illégale, en autant que l'appelante n'est pas propriétaire d'une partie des immeubles sur lesquels les taxes avaient été imposées et faites payables par l'appelante, savoir, cette partie du chemin de fer qui s'étend depuis la rue Jacques-Cartier à la rue Longueiul ;

4o. Parce que l'intimée a agi illégalement en imposant ces taxes et en pratiquant une saisie sur les biens de l'appelante.

Après certaines exceptions préliminaires plaidées par l'intimée et renvoyées par la Cour de première instance, l'intimée a plaidé par une défense en droit et une défense au fond.

Par sa défense en droit l'intimée allègue qu'il n'appert pas par la requête libellée que l'appelante ait droit à un bref d'injonction : parce qu'il n'appert pas que l'appelante n'avait pas d'autre remède à ses prétendus griefs que le bref d'injonction ; parce que l'appelante avait, en vertu de la loi, une autre voie que le bref d'injonction pour le redressement de ses prétendus griefs ; parce que les allégations, tel que libellées sont mal fondées en loi et ne justifient pas les conclusions prises en la dite requête.

Par sa défense au fond, l'intimée allègue qu'en vertu de sa charte elle a droit de taxer toutes les propriétés immobilières qui se trouvent situées dans les limites de la ville de Saint-Jean, et que cette partie du pont qui traverse la rivière Richelieu et qui se trouve située dans les limites de la ville de Saint-Jean, est sujette à une taxe comme les autres immeubles ; que tous les biens mobiliers qui ont été portés au rôle d'évaluation au nom de l'appelante sont occupés par elle et que l'intimée n'en connaît pas d'autre propriétaire ; que le bref d'injonction est mal fondé.

Le jugement de la Cour de première instance a maintenu les défenses de l'intimée et renvoyé la requête libellée de l'appelante.

I. La première question qui se présente ici est celle de

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savoir si la législature de Québec avait le droit de fixer les limites de la ville de St-Jean, d'un côté, à une ligne imaginaire séparant par le milieu la rivière Richelieu.

Il n'est pas douteux que la législature de Québec avait le droit de fixer à une ligne imaginaire divisant par le milieu la rivière Richelieu, les limites de la ville de St-Jean, sans agir inconstitutionnellement.

Nul doute que les rivières navigables, comme la rivière Richelieu, sont sous le contrôle du gouvernement fédéral, mais la question qui se présente ici n'est pas celle de savoir si la rivière Richelieu est exclusivement sous le contrôle du gouvernement fédéral, mais bien si les limites de la ville de St-Jean pouvaient être fixées d'un côté au centre de la rivière Richelieu, par la législature; et à cela il ne peut y avoir aucun doute.

L'acte d'incorporation de la ville de St-Jean n'empiète nullement sur les droits du gouvernement fédéral, en faisant une législation n'affectant en aucune manière le contrôle que le gouvernement fédéral peut avoir sur la rivière Richelieu. Cet acte d'incorporation détermine purement et simplement où seront les limites de la ville de St-Jean du côté de la rivière Richelieu, mais il n'exerce aucun contrôle sur la rivière Richelieu en autant que rivière navigable, et il n'attribue à la ville de St-Jean aucune autorité, ni aucun pouvoir qui vienne en conflit avec l'autorité du pouvoir fédéral.

Cette question s'est déjà présentée, dans une cause de *La ville de Longueuil contre la Compagnie de Navigation de Longueuil*, rapportée au 6e vol. du *Legal News*, p. 291, et jugée par la Cour Supérieure à Montréal, présidée par l'honorable juge Taschereau dont le jugement a été confirmé à l'unanimité en révision. Dans cette cause il a été décidé que :

"The limits of the municipality of the town of Lon-
" gueuil extend to the centre of the river St. Lawrence,
" and the wharf situated within the said limits, occupied
" and used as the property of a ferry company, is liable to
" taxation by the municipality."

Cette prétention de l'appelante est donc mal fondée.

II. La seconde question qui se présente est celle qui a rapport à l'autorité que peut avoir l'intimée d'imposer une taxe sur les immeubles situés dans la ville de St-Jean.

Cette autorité se trouve établie par la section 86ème de l'Acte d'incorporation de la ville de St-Jean. En effet le paragraphe 1er de cette sect. 86 nous dit que la ville de St-Jean pourra prélever annuellement des taxes : "sur tous terrains, lots de ville ou portions de lot, soit qu'il existe ou non des bâtisses sur iceux, avec tous les bâtiments et constructions dessus érigées, une somme n'excédant pas un demi-centin par piastre sur la valeur totale réelle telle que portée au rôle des cotisations de la dite ville."

Il est vrai que la première partie de cette section 86, version française, ne semble donner à l'intimée que le droit de taxer les meubles ; il n'y est question que de "propriétés mobilières," mais c'est évidemment une erreur cléricale.

En effet, la sous-section 1ère venant immédiatement à la suite, énumère quels sont les "immeubles" que l'intimé pourra taxer. Or cette énumération ne serait certainement pas faite si l'intimée n'avait que le droit de taxer les meubles.

Mais ce qui fait disparaître tout doute, c'est que la version anglaise du statut contient dans la première partie, le mot immeuble, "*immoveable*," précisément à l'endroit où il n'est question que de meubles dans la version française.

Il est donc évident que, sur ce point comme sur le premier, l'appelante est mal fondée dans sa prétention.

III. La troisième question sur laquelle cette honorable Cour aura à se prononcer est celle qui a trait à l'autorité que pouvait avoir l'intimée d'imposer des taxes sur des immeubles dont l'appelante ne serait que locataire.

Cette question doit aussi se décider en faveur des prétentions de l'intimée.

L'appelante dit elle-même, dans sa requête libellée, qu'elle n'est que locataire d'une certaine partie des immeubles sur lesquels la ville de Saint-Jean a imposé des

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taxes ; or d'après les dispositions de la sect. 370 des clauses générales des corporations de villes il est décrété que :

"Les taxes municipales imposées sur un terrain pour-
"ront être réclamées aussi bien du locataire, de l'occupant
"ou autre possesseur de ce terrain que du propriétaire, de
"même que de tout acquéreur snbséquent de ce terrain,
"lors même que tel locataire, occupant, possesseur ou
"acquéreur n'est pas inscrit sur le rôle d'évaluation."

La clause 98 de l'Acte d'incorporation de la ville de Saint-Jean dit que la section 370 des clauses générales des corporations de ville, s'appliquera à la ville de Saint-Jean.

De ce chef non plus, l'appelante ne peut être accueillie par cette honorable Cour.

DORION, Ch. J. :—

This case appeared to raise important questions, but on looking into it the Court does not find much difficulty. By the Act of incorporation of the town of St. Johns the eastern limit was fixed at a line running in the middle of the River Richelieu. The Central Vermont Railway Company have a bridge crossing the river. The assessors of the municipality of the Town of St. Johns have for the last four years assessed the part of the bridge which starts from the north shore to the middle of the river. The municipality were about to collect the amount of the taxes, and issued their warrant, when the Central Vermont took a writ of injunction to have it ordered that the town should not collect the taxes because they were *ultra vires*. The reason assigned was this : That the province of Quebec could not by the Act which was passed in 1880 unite to the town of St. Johns part of a navigable river under the control of the Dominion Parliament ; and that the bridge which was over the river could not be taxed by the municipality. There can be no doubt that the limits of the town are the middle of the river bed. It is territory within the jurisdiction of the local Legislature. And that being so, it would be a singular thing if the authority of the corporation did not extend to what was

done on the river. For example, places for the sale of liquor might be established every winter on the ice without any license. The river is not under the control of the Dominion Parliament. "Shipping and navigation" are the words used in the B. N. A. Act. That does not mean the river at all. The river itself belongs to the local Crown domain. Of course, the local Legislature could not stop navigation on the river, that is all. When the local Act said the limits of the town should extend to the middle of the river, it merely vested the municipality with authority to make laws for the river. The other objections which have been raised to the validity of the assessment do not appear to us to be well founded.

Judgment confirmed.[1]

Church, Chapleau, Hall & Nicolls, attorneys for appellants.

Robidoux & Fortin, attorneys for respondents.

(J. K.)

[1] The above judgment was reversed, on appeal, by the Supreme Court of Canada, 14 Can. S. C. R. 288, and special leave to appeal to Her Majesty having been granted, the judgment of the Supreme Court was affirmed 25th July, 1889, 12 Leg. News, p. 290.

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ACCOUNT.

Executor who has been discharged—Action against.] *See* EXECUTOR, 158.

ACCOUNTABLE RECEIPT. *See* EXTRADITION, 145.

ACTION.

Money paid by error.] Where, in ignorance of an exemption created by law, money was paid as taxes on an educational institution, *held*, that it might be recovered. (2.) In such action, when it was alleged that such payment had been made under constraint and it was proved to have been made voluntarily, but through error of law and of fact, an amendment to make the declaration, conform with that proof was not an alteration sufficient to change the nature of the action, and should be allowed even after the case had been submitted. *Haight & City of Montreal*, 353.

—— *En dénonciation de nouvel œuvre.*] *See* STATUTORY PRIVILEGE, 104.

ACQUIESCENCE. *See* LESSOR AND LESSEE, 113.

AGENT. *See* PRINCIPAL AND AGENT.

APPEAL.

On question of evidence.] The Court of Appeal will not reverse a judgment dismissing an action of damages for libel, when it is merely a question of appreciation of evidence, and the appellant in any case would only be entitled to nominal damages. *Donovan & The "Herald" Company*, 41.

ARBITRATION.

Fees of counsel—Taxation.] A Judge of the Superior Court may, in his discretion, allow fees to counsel on an arbitration to fix the indemnity to be paid for lands taken by a railway company, conducted under the provisions of the Quebec Consolidated Railway Act, 43-44 Vic., c. 43, s. 9; and there is no power in the Court to revise such taxation. *La Cie. du Chemin de Fer de Montréal & Sorel & Vincent*, 404.

ASSIGNMENT OF FACTS FOR JURY. *See* PROCEDURE, 140, 225.

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Fees of counsel on arbitration.] *See* ARBITRATION, 404.

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COMMITMENT. *See* EXTRADITION, 145.

COMMUNITY. *See* DONATION, 328.

COMPOSITION. *See* FRAUD, 399.

COMPANY.

Quorum of directors.] Where the quorum of directors of a railway company was fixed at three, by a special statutory provision, and the company was subsequently amalgamated with another company, and it was provided by the Act of Amalgamation that the Board of Directors of the amalgamated company should not be less than five nor more than seven directors (without expressly changing or regulating the quorum): *held*, that the original provision, making three directors a quorum, continued in force. *Fairbanks & O'Halloran*, 163.

CONFESSION. *See* EXTRADITION, 145.

CONSTITUTIONAL LAW.

Navigable river.] The clause in the Act of Incorporation of the town of St. John's, P.Q., extending the limits of the town to the middle of the Richelieu river, a navigable river, is *intra vires* of the local legislature. *Central Vermont Railway Co. & Town of St. John's*, 466.

CONTEMPT OF COURT.

Judgment where person holding moveable property in contempt of order of Court, is adjudged the lawful owner.] While an action of revendication of some machinery was going on, the plaintiff obtained an order of a judge, giving him provisional possession of the machinery. Nevertheless, by collusion between the defendants, the property was put into the possession of White, intervenant. The plaintiff having taken a rule for contempt, the defendants and intervenant were ordered to give over the property within three days, which order was disobeyed. *Held* (reforming the judgment of the Superior Court, M. L. R., 1 S. C. 288), that White was guilty of contempt, and should be fined $100; but that it was no longer expedient to order him to give up the machinery, because in another action, in which judgment was rendered at the same moment as that on the rule, White was declared to be the lawful proprietor of the machinery. *Kieffer & Whitehead*, 239.

COSTS. *See* PROCEDURE.

CREDITOR. *Rights of unpaid creditor.*] *See* PROCEDURE, 328.

CRIMINAL LAW.

2 *R. S., ch.* 157, *s.* 8—*Vagrant—Licensed carter soliciting fares near door of hotel.*] A licensed carter who, contrary to a city ordinance, loitered near the entrance to a hotel in the city of Montreal, and solicited passengers for conveyance in his cab, is not a loose, idle,

CRIMINAL LAW—*Continued.*

or disorderly person, or a vagrant, within the meaning of 2 R. S., ch. 157, s. 8,—more especially where it is not proved that such loitering obstructed passers-by, or incommoded guests in the hotel. *Smith* v. *Reg.*, 325.

—— *See* EXTRADITION, 145.

CUSTOMS LAW.

Revendication, by importer, of goods retained as forfeited by collector of customs—Order for delivery to plaintiff—Security.] Where goods were retained by the collector of customs as forfeited under the Customs Act, 1883, and the importer seized them in the collector's hands by process of revendication, *held*, that the plaintiff was entitled to an order for the delivery thereof only on making deposit with the collector of a sum of money at least equal to the full value of the goods. *Quære*, whether, pending a controversy between the importer and the Customs Department, an action of revendication will lie to revendicate goods retained by the collector as forfeited. *Semble* (*per* CHURCH, J.), that it is not competent for an importer to adopt this proceeding under the circumstances. *Ryan & Sanche*, 312.

DEED.

Interpretation of—Conflict between written and printed clauses.] Where two clauses in a deed conflict,—the one written and the other printed, the written clause should have effect, as more likely to contain the real intention of the parties. *Desrosiers & Lamb*, 45.

DELEGATION.

Not accepted—Effect of—Art. 1180 *C.C.*] A delegation until it is accepted does not bind the parties delegants ; it only operates as an *indication de paiement*. *Reeves & Darling*, 357.

DESCRIPTION. *See* SALE, 337.

DONATION.

Gift of immovable property made to consorts jointly by ascendant of one of the consorts—Effect of—Art. 1276, *C.C.*] The gift of immovable property by a father to his daughter and her husband jointly, is deemed to be a gift to the daughter alone (C.C., Art. 1276) ; and so where a judgment against the son-in-law is registered against property so given, there is no hypothec, the title not being in the son-in-law. *St. Ann's Mutual Building Society & Watson*, 328.

EDUCATIONAL INSTITUTION. *See* EXEMPTION FROM TAXES, 1, 353.

ERROR, MONEY PAID BY. *See* ACTION, 353.

EVIDENCE.

Entries in books.] *See* PARTNERSHIP, 246.

—— *Written and printed clauses.*] *See* DEED, 45.

EVOCATION. *See* PROCEDURE, 271.

EXECUTOR.

Discharge of—Action for account.] After a testamentary executor has been discharged by a deed signed by all the legatees, an action against him praying for an account, brought by one of the legatees who joined in the discharge, and without asking that the discharge be set aside, will be dismissed. *Newton & Seale*, 158.

—— *Removal of executor—C. C.* 917, 282, 285.] (Reversing the judgment of the Court of Review, M. L. R., 3 S. C. 31), the existence of a law suit between one executor and the estate he represents, especially when there are several executors, is not a sufficient cause for the removal of such executor. (2.) Art. 282, C. C., does not apply to executors chosen by the testator. *Mitchell & Mitchell*, 191.

—— *Testamentary executor—Right to possession of moveables of the succession —Art.* 918, *C.C.*] The father of minors, legatees under a will, cannot exclude the testamentary executor from the possession of the moveable property of the succession, even for the use of the minors. *Normandeau & McDonnell*, 319.

EXEMPTION FROM TAXES.

City of Montreal—41 Vic. (*Q.*) *ch.* 6. *s.* 26—*Municipal taxes—Local assessment for local purposes—Educational institution—Exemption.*] (Reversing the judgment of the Superior Court, M. L. R., 2 S. C. 265), the assessment imposed on the proprietors benefited, for the cost of a work of a local character and for the benefit of properties in a particular section of the city of Montreal, is not a municipal tax within the meaning of 41 Vict. (Q.). c. 6, s. 26, but is of the nature of a local assessment for local purposes, and as such does not come under the exemption from municipal taxes accorded to educational institutions by the statute above cited. (Reversed by Supreme Court.) *La Cité de Montréal & Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal*, 1.

—— *Educational institution.*] Property occupied as a private boarding and day school for girls, where there are numerous pupils and teachers, and no grant is received from the municipality in which it is situated, is an educational institution, within the meaning of § 2, C. S. C., cap. 15, sec. 17, as amended by 41 Vic. cap. 6, sec. 26, and consequently exempt from municipal and school taxes. *Haight & City of Montreal*, 353.

—— *Exemptions from taxation—M. C.* 712, 978*a*—*Taxes imposed by municipal by-laws for payment of interest and creation of sinking fund for redemption of municipal debentures.*] Taxes imposed by municipal by-laws for the payment of the interest and the creation of a sinking fund for the redemption of municipal debentures constitute a hypothec upon all the real property of the municipality taxable at the date of the passing of such by-laws, and the hypothec continues to affect the property even when it passes into the hands of a purchaser in whose possession it would have

EXEMPTION FROM TAXES—*Continued.*

been exempt from taxation had he owned it at the date of the passing of the by-laws. *La Communauté des Sœurs des Saints Noms de Jésus et Marie & The Corporation of the Village of Waterloo*, 20.

EXTRADITION.

Habeas corpus—Jurisdiction of committing magistrate—Forgery—"Accountable receipt"—R. S. ch. 165, *s.* 29—*Alteration—Confession, Admissibility of—Informalities of Procedure.*] Where a commissioner has been appointed under the Great Seal of Canada (Sect. 5 of the Extradition Act, R. S. ch. 142), and his appointment as such commissioner has appeared in the official *Gazette*, and he is thereby "authorized to act judicially in extradition matters under the Extradition Act, within the Province," and he describes himself in a warrant of commitment as "a Judge under the Extradition Act,"—that his jurisdiction is sufficiently disclosed. (2.) In examining, upon a petition for *habeas corpus*, whether the detention of the prisoner is lawful, the Court or Judge will set aside the commitment only if there be manifest error in the adjudication. If the commissioner had jurisdiction, and there was legal evidence before him, which might justify a committal, the Court is not called upon to examine the sufficiency of the evidence. (3.) If the first commitment is irregular, but be replaced, before the return of the *habeas corpus*, by a valid commitment, the prisoner will not be discharged. (4.) (Approving the decision of Mr. Rioux, 11 Leg. News, 323,) A statement of account, such as is received by a bank, from other banks having business connections with it, and containing an acknowledgment of the receipt of money to be accounted for, is an "accountable receipt" within the meaning of R. S., ch. 165, s. 29, and the fraudulent alteration thereof is a forgery. (5.) A confession as to alteration of such "accountable receipt," made by an officer of a bank, after his connection therewith has terminated, to a fellow employee, no director of the bank being present, is not made to a person in authority; and when such confession is made without any inducement being held out, and after the accused was warned not to state anything that he did not wish repeated to the directors, it is admissible in evidence. (6.) In a case of forgery, it is not necessary to prove the legal existence of the bank intended to be defrauded: it is sufficient to prove generally an intent to defraud; but in this case the legal existence of the bank was sufficiently proved. (7) The omission, in the jurat, of the place where the depositions were taken is not material, where the place is mentioned in the heading or margin, and is otherwise certified to. (8.) The fact that an indictment for embezzlement has been found against the accused, in the State from which he fled, does not prevent a demand being made for his surrender for forgery. (9.) An alteration of a writing or "accountable receipt," made to cover a fraud previously com-

EXTRADITION—*Continued.*

mitted, is a forgery, though no money was taken at that time. (10.) In proceedings for the extradition of a fugitive, evidence to contradict that of the prosecution is not admissible. The accused is only entitled to show that the offence charged is not a crime mentioned in the treaty. *Ex parte DeBaun*, 145.

FOREIGN CORPORATION.

Service of process.] *See* PROCEDURE, 393.

FORGERY. *See* EXTRADITION, 145.

FRANC ET QUITTE, CLAUSE OF. *See* SALE, 422.

FRAUD.

Person purchasing property of relative and agreeing to pay his debts—Composition with creditor ignorant of such purchase.] A person who buys the property of his brother-in-law in order to assist him, agreeing to pay his debts (which exceed the value of the property), may licitly contract with a creditor, who does not know of the sale, to take less than the face value of the debt,—more especially where the creditor had previously endeavored to sell the debt at such reduced amount, and the transaction is advantageous to him. *Blouin & Brunelle*, 399.

—— *See* GARNISHEE, DECLARATION OF, 163.

—— *On creditors.*] *See* INSOLVENT ACT, 298.

FREIGHT. *See* SHIPPING, 70.

FUTURE RIGHTS. *See* PROCEDURE, 271.

GARNISHEE, DECLARATION OF.

Fraud.] In determining whether a declaration was made by a garnishee fraudulently and collusively, the principle applicable is, that it is only when an act operates a prejudice to legal rights that the motive can be questioned, and it is only a party who has been prejudiced that is entitled to complain. The facilitating of legal remedies by a debtor in favor of his creditors does not amount to fraudulent collusion. And in the present case there was sufficient evidence of the indebtedness declared by the garnishee, apart from the existence or validity of the lease referred to in the case. *Fairbanks & O'Halloran*, 163.

HABEAS CORPUS. *See* EXTRADITION, 145.

INJUNCTION. *See* NUISANCE, 197.

INSOLVENT ACT.

Judgment obtained in fraud of creditors—Sale en bloc—Notice—Prescription—Intervention.] John Stephen, in 1865, became an insolvent under the Insolvent Act of 1864. The principal asset was the share to which he would become entitled on the division of his deceased father's estate, which division was not to take place

INSOLVENT ACT—*Continued.*

until the youngest child became of age (in 1881). In the meantime the insolvent's share of the revenues accumulated in the hands of the executors, and was at the disposal of his assignee, but was not claimed by him, and remained in the hands of the executors. John Stephen obtained his discharge, and long afterwards, in 1879, made an offer of ten cents on the dollar for his estate. This offer amounted to about $3,000. At this time there was nearly double that amount of accrued revenues in the hands of the executors. The offer was accepted by a resolution of creditors at a meeting which was called without specifying the object in the notice thereof, and creditors who were themselves insolvent attended and voted. An order of the Insolvent Court was obtained on the 17th April, 1879, ordering the assignee to carry out the resolution, and the estate was then re-conveyed to John Stephen, who paid the ten cents out of the accumulated revenues, and retained the surplus. He subsequently, in 1881, sold his share of his father's real estate to his brother George C. Stephen, the appellant, for $5,000. On a petition by a creditor to the Insolvent Court to revoke the judgment of 17th April, 1879, as having been obtained fraudulently, the assignee not having disclosed the true position of the estate : *Held*, (1.) That the Insolvent Court had jurisdiction to entertain the petition and revoke the judgment of 17th April, 1879, and that an action at law to set aside the sale of the estate was not necessary. (2.) That the prescription of one year under Art. 1040, C.C., did not apply, as John Stephen, having obtained his discharge before he purchased the estate, was not a debtor. (3.) That the judgment of 17th April, 1879, should be revoked, the resolution of creditors authorizing the sale *en bloc* being illegal, the meeting not having been called in accordance with s. 38 of the Insolvent Act of 1875, and the assignee having concealed the true position of the estate. (4.) That the intervention of George C. Stephen was unfounded, his purchase of his brother's share of the real estate not being impugned by the present proceedings. *Stephen & Hagar*, 298.

INSURANCE, FIRE.

Goods destroyed in premises other than those described in policy—Inspection by company's agent—Motion for judgment on verdict.] A policy of insurance was effected on goods of the insured in No. 319, and the insurance was afterwards renewed without variation of its original conditions. Before the renewal, the insured had extended his premises into No. 315, and the company's agent visited the establishment, and saw the portion of both buildings occupied by the insured, and the goods contained therein. A fire destroyed the goods in No. 315, and slightly injured those in 319. In an action on the policy, claiming for the loss both in No. 319 and in No. 315, the jury found the facts as above stated, and both parties moved for judgment on the verdict. *Held*, (1.) Reversing the judgment in Review, 4 Leg. News, 140, that where

INSURANCE, FIRE—*Continued.*

the findings of the jury are accepted by both parties as favourable to their respective pretensions, and the plaintiff moves for judgment on the verdict, the defendant may also move for judgment in his favor on the verdict, notwithstanding anything contained in Arts. 422, 433, C. C. P. (2.) That on the facts found by the jury as above, the judgment should be for the defendants as to loss of goods in No. 315; the inspection of the premises by the company's agent, before the renewal of the policy, not being sufficient to establish an agreement to vary the terms of the policy in respect of the locality in which the goods were represented to be. *Citizens' Insurance Co. & Lajoie*, 362.

INTERVENTION. *See* INSOLVENT ACT, 298.

JOINDER OF ACTIONS. *See* PROCEDURE, 404.

JUDICIAL PROCEEDINGS.

Publication of.] *See* LIBEL AND SLANDER, 122.

JURAT. *See* EXTRADITION, 145.

JURISDICTION.

Of Superior Court.] *See* LESSOR AND LESSEE, 264.

—— *See* PROCEDURE, 393.

JURY TRIAL. *See* LIBEL AND SLANDER, 84; PROCEDURE, 140, 225.

LESSOR AND LESSEE.

Lease—Construction of.] Where the lease stipulated that the lessee should have the use of a portion of the yard in rear of the building leased, which portion should be determined by the lessor, with right to the lessee to fence the same at his option; *held*, that the lessor was not entitled, after the lessee had been four years in possession with the yard open, to erect a fence across the yard, more especially as the fence deprived the lessee of light and air. *Myler & Styles*, 116.

—— *Occupation of shed not mentioned in the lease—Accessory—Acquiescence.*] Where the lessee leased buildings in course of construction, and, on taking possession of the same, also occupied and used, without objection on the part of the lessor, during nearly four years, a small shed in the rear of the leased premises; *held*, that the shed, though not mentioned in the lease, nor shown on the architect's plans of the buildings, must be considered as an accessory of the premises leased, and that the lessor, by acquiescing in the lessee's occupation for so long a period, without claiming rent, had placed that construction upon the contract. *Myler & Styles*, 113.

—— *Arts. 887-899, C. C. P.—Jurisdiction of Superior Court—Declinatory exception.*] Massé & Co. sub-let to respondent certain premises held by them under a lease; and they also leased sundry moveables therein for a certain sum payable in monthly instal-

LESSOR AND LESSEE—*Continued.*

ments; the respondent also becoming liable for the rent payable to the proprietor of the premises under the lease to Massé & Co. In case of default to pay the instalments the right to resiliate the lease was stipulated. Massé & Co. transferred their rights to the appellant, who brought an action to resiliate the lease on the ground of default to meet the instalments. The proceedings were under the special procedure provided by C. C. P. 887 *et seq.* *Held* (reversing the judgment of the Superior Court, M. L. R., 3 S. C. 197), that the appellant having the right to resiliate for default, the action was improperly dismissed on a declinatory exception. *Per* Bossé, J.: That, in any case, the Superior Court having jurisdiction, the objection to the summary procedure was matter to be pleaded by exception to the form, and not by declinatory exception. *Lusignan & Rielle*, 264.

LIBEL AND SLANDER.

Libel in newspaper and libel in pleadings—Incidental demand—Evidence as to truth of libel—Evidence of previous character of plaintiff—Verdict of jury in libel cases—Excessive award—Absence of material witness—Affidavit of juror as to motives of other jurors—Reading of unproved newspaper report to jury.] An incidental demand is sufficiently *libellée* if instead of setting out at length a libel complained of, it refers to an answer to plea immediately preceding, as forming part thereof. (2.) An incidental demand will not be rejected as illegally filed because it is not accompanied by a petition as required by Art. 152 C.C.P. (3.) Under the laws of this Province an action lies for libellous allegations contained in pleadings. (4.) A plaintiff in an action for libel, who is attacked by an additional libel in the plea to his action, may proceed by incidental demand in order to obtain a condemnation for this additional libel. (5.) When the defendants in a jury trial have issued a *venire facias*, attended at the striking of the panel, proceeded to trial, and taken their chance of a favorable verdict, they cannot afterwards obtain a new trial on account of alleged defects in the assignment of facts for the jury. (6.) A new trial will not be granted because a material witness was absent, although he was duly subpœnaed and the proper conduct money was tendered him, when the party who called him neglected to apply for a postponement of the trial. (7.) Evidence tendered by the defendant in an action of libel as to the previous conduct and character of the plaintiff was properly rejected as illegal, especially when such matters were not referred to in the pleadings. (8.) (*By the majority of the Court.*) In actions for libel, the assessment of damages is peculiarly the province of the jury, and a verdict of $6,000 for the newspaper libel complained of in this case, and of $4,000 for the libellous allegations of the plea, was not so excessive as to lead to the inference that the jury were led into error or actuated by improper motives. *Mail Printing Co. & Laflamme*, 84.

LIBEL AND SLANDER—*Continued.*

Newspaper reports of public meetings.] A newspaper is not privileged in publishing insulting expressions applied by one person to another at a public meeting, and which have nothing to do with the business of the meeting. But where such publication was made without malice, and the report was promptly corrected as the plaintiff desired, and no damage was proved, a judgment dismissing an action against the newspaper was confirmed. *Donovan & The "Herald" Co.*, 41.

—— *Telegraph Company—Transmission of libellous matter—Publication of judicial proceedings—Damages.*] The publication of an extract from the declaration of a party in a suit entered, but before the return of the action, is not privileged. (2.) The communication by a telegraph company of a despatch to its employees engaged in transmitting and receiving such despatch, is a publication. (3.) A telegraph company is not bound to transmit a despatch of a libellous character, and is not entitled to plead its statutory obligation to transmit the despatches entrusted to it, in answer to an action of libel for the transmission of a libellous despatch. (4.) The refusal of the defendant to disclose the name of the person at whose request the libellous matter was transmitted, was an aggravation of the wrong, and substantial damages should be awarded. *Archambault & Great North Western Telegraph Co.*, 122.

LOAN TO A PARTNER. *See* PARTNERSHIP, 246.

MISNOMER. *See* PROCEDURE, 225.

MONEY PAID BY ERROR. *See* ACTION, 353.

MONTREAL, CITY OF. *See* EXEMPTION FROM TAXES, 1.

MORTGAGE OF VESSEL. *See* SHIPPING, 70.

MUNICIPAL LAW. *See* EXEMPTION FROM TAXES, 1, 20.

NAVIGABLE RIVER. *See* CONSTITUTIONAL LAW, 466.

NEGLIGENCE. *See* RAILWAY.

NEWSPAPER REPORTS. *See* LIBEL AND SLANDER, 41.

NUISANCE.

Long established industry—Tannery—Pollution of running stream—Nuisance—Injunction.] The appellant and his predecessors had, from time immemorial, carried on the business of tanning leather in Côte des Neiges,—that being the principal industry of the village. A small stream, which ran through the lands of both parties, and which was partly used as a drain, received certain noxious substances from the tannery. The respondent, who had, within a few years, acquired a lot ten or fifteen arpents lower down,—and with knowledge of the industry long established in that place,—complained of the pollution of the stream by the substances from the tannery, and asked for an injunction. There

NUISANCE—*Continued.*

were other proprietors between the parties, but the respondent alone complained of the nuisance. The effect of the injunction, if granted, would be to destroy the principal industry of the locality: *Held* (reversing the judgment of the Superior Court, M. L. R., 2 S. C. 326), that the appellant was not entitled to the injunction. *Claude & Weir*, 197.

PARTNERSHIP.

Art. 1867, *C.C.—Loan to partner—Promissory note representing loan—Action against firm—Evidence—Entries in books.*] In an action against a firm composed of Cadwell and Henry J. Shaw, for the amount of loans alleged by the plaintiff to have been made by him to the firm, but which were represented by notes signed by Henry J. Shaw alone: *Held*, that the presumption arising from entries in the books of the firm, purporting to show that the loans were made to the firm, was completely rebutted by evidence that these entries were made by the plaintiff's son, then cashier of the firm, and were subsequently rectified by the firm; and further, by the letters of the plaintiff himself to Henry J. Shaw, which contained an acknowledgment that the loans were made to Henry J. Shaw individually. (2.) A partnership will not be held liable under Art. 1867, C.C., for the amount of a loan made to one of the partners, although the money was applied by such partner to the use of the partnership, if it appear that the lender, though he was aware of the existence of the partnership, gave credit to the borrower personally, accepted his promissory notes for the debt, and looked to him as his debtor. *Cadwell & Shaw*, 246.

—— *Misappropriation by partner of other moneys to use of firm—Liability of firm—Limited partnership—Arts.* 1875, 1877, 1880 *C.C.—Registration—Special partner.*] (1.) Where one of the partners in a firm misappropriated moneys belonging to a certain building society, of which he was the secretary-treasurer, and applied them to the uses of his firm, entering them in the books as "loans"—not from himself but from others, these moneys, although obtained by him tortiously without the privity of his co-partners, having gone into the business of the firm, the members of the firm were held jointly and severally responsible to the original owners for the amount thereof, to the same extent as if the loan had been made legitimately. (2.) Where the $15,000 capital originally put into a firm by a special partner had become impaired, and was reduced to less than $9,000 at the time a new firm was formed, the declaration then made, that the capital put in by the special partner was $15,000, was a false statement within the meaning of Art. 1877, C.C., and entailed upon the special partner the liability of an ordinary partner. (3.) The omission to use the name of one or more of the general

PARTNERSHIP—*Continued.*

partners in the partnership name makes a special partner liable as a general partner, under Art. 1880, C.C. *Commercial Mutual Building Society & Sutherland*, 52.

—— *Person held out to the public as partner.*] *See* PRINCIPAL AND AGENT, 256.

PLEADING.

Art. 144 *C.C.P.*] To an action to recover the value of a mare killed on the defendants' line, the defendants pleaded specially that the fences on each side of their railway were good and sufficient; that there was no negligence; and that they had never been put *en demeure* with regard to their fences being out of order. This was followed by a *défense en fait*. In the course of the *enquête* there was evidence which indicated that the locality where the accident occurred was not on the defendants' railway line, but on that of the Grand Trunk Company which controls the defendants' line. On defendants' offering evidence on this point, the Court below maintained the objection to the testimony on the ground that there was no contestation raised as to the road on which the accident occurred. *Held*, that the defendants having pleaded specially, without raising any question as to their ownership of the road, the plaintiff was not obliged to prove the truth of an allegation which had not been specially denied, and which must be taken as admitted. *Compagnie du Chemin de Fer & Ste. Marie*, 283.

POLLUTION OF STREAM. *See* NUISANCE, 197.

PRESCRIPTION.

Art. 2261, *C.C.*] A claim for the value of wood wrongfully cut and carried away from plaintiffs' land, is not prescribed by two years, the prescription of C. C. 2261, § 2, not being applicable to such claim. *Eaton & Murphy*, 337.

—— *See* INSOLVENT ACT, 298.

PRINCIPAL AND AGENT.

Revocation of agency—Agent's right to indemnity—Prospective profits.] The appellants, commission agents, obtained the selling agency for the product of the respondent's cotton mill. As the condition of receiving the agency they were required to subscribe $10,000 in the capital stock of the company, respondent. No term was fixed, and after the lapse of a year and some months the agency was withdrawn from the appellants. In an action for indemnity by the agents. *Held*, (1.) affirming the decision of JOHNSON, J., M. L. R., 3 S. C. 9, that a mandate for which no term has been stipulated is revocable at will, even where the agent has given a consideration for the agency. (2.) The revocation is subject to the obligation on the part of the principal to indemnify the agent for any actual loss suffered by him by reason of the revocation of the mandate. The agent's claim to indemnity cannot be extended so as to include loss of profits which he would have

PRINCIPAL AND AGENT—*Continued.*

made if the agency had been continued, but merely such expenses as he incurred in order to carry on the business, and which, in the particular circumstances of the case, may be seen to have been contemplated at the time the appointment was made. *Cantlie & Coaticook Cotton Co.*, 444.

—— *General agent—Person held out to the public as—Authority to draw bill.*] The appellants, W. F. L. and J. L. L., who were carrying on an ordinary business in Montreal under the firm of W. F. L. & Co., also appointed one J. H. Wilkins as their agent and manager to carry on a business on their account under the name of J. H. Wilkins & Co. It was proved that Wilkins was in the habit of endorsing bills receivable with the name of the firm, and that he sometimes drew bills on customers. The respondent discounted one of these bills in good faith, in the same manner as he had discounted similar bills previously. *Held*, that the fact of Wilkins' name being given to the business, and its being conducted by him, whether he was a partner or not, was sufficient to hold him out to the world as a general agent; and appellants were liable to the respondent for the amount of the draft so discounted, whatever might be the use to which Wilkins, without respondent's knowledge, applied the proceeds. *Lewis & Walters*, 256.

PRIVILEGE FOR SUPPLIES. *See* SHIPPING, 70.

PROCEDURE.

Amendment of declaration.] *See* ACTION, 353.

—— *Costs on incidental proceeding.*] The non-payment of costs on an incidental proceeding in a suit does not entitle the party to whom the costs are due to a stay of proceedings until the costs are paid, where the judgment which condemned to costs did not make it a condition that such costs should be paid before further proceedings be taken. *Robinson* v. *Canadian Pacific Railway Co.*, 344.

—— *Declinatory exception.*] *See* LESSOR AND LESSEE, 261.

—— *Distribution of monies before the Court.*] When money is before the Court for distribution, the real question is as to the party entitled to it—and not the regularity of the proceedings by which it was procured. *St. Ann's Mutual Building Society & Watson*, 329.

—— *Evocation—Art.* 1058, *C. C. P.—Rights in future—Penalty of so much per day for not maintaining gates at railway crossings.*] Where a railway company was sued for ninety dollars, being the amount of penalties for nine days, under a by-law of a town enacting a penalty of ten dollars per day in the event of the company's making default to erect gates at the intersection of the railway with certain streets: *Held*, that rights in future within the meaning of Art. 1058, C. C. P., were affected, and the defendant might evoke the action to the Superior Court. *Compagnie du Grand Tronc & Ville de St. Jean*, 271.

PROCEDURE—*Continued.*

—— *Execution—Rights of unpaid creditors.*] An unpaid creditor can raise the question as to the real owner of the property sold in execution, and can claim the proceeds, although the real owner be silent. *St. Ann's Mutual Building Society & Watson*, 328.

—— *Foreign corporation—Action against—Service—Arts.* 34, 49, 64, *C.C.P.—Cause of action.*] A corporation whose principal place of business is in a foreign country, may be served with process at any place in the Province of Quebec where it has an office for the transaction of business. So, where a foreign corporation had an office at Montreal, for the sale of sleeping car tickets, and the plaintiff, who had bought a ticket from the defendants at New York, for a sleeping-car berth from that city to Montreal, brought an action of damages, alleging that he had been unlawfully expelled from the sleeping car, it was held that the service of his action at the office of the company in Montreal, was a sufficient service to give the Court at Montreal jurisdiction. Further, that although the expulsion took place beyond the province line, yet as it continued until the plaintiff reached Montreal (he being forced to ride in a first class car), the cause of action arose in this province. *N. Y. Central Sleeping Car Co. & Donovan*, 393.

—— *Joinder of actions—Non-appealable cases consolidated with appealable case.*] Where several non-appealable actions in the Circuit Court are consolidated with one that is appealable, as involving the same question, the whole will be adjudicated, on an appeal in the principal case. *La Cie. du Chemin de Fer de Montréal & Sorel & Vincent*, 404.

—— *Jury trial—Assignment of facts.*] The object of the assignment of fact is that the jury may determine all the finite facts in dispute between the parties, and respecting which the Court requires to be informed, in order to decide the question of law in issue between them. It must be so framed as to be sufficiently comprehensive, and at the same time carefully exclude any evidence from which the jury may draw an inference; and the assignment of facts in this case conformed to this rule. *McRae* v. *Canadian Pacific Railway Co.*, 140.

—— *Jury trial—Time for fixing facts for jury—Art.* 352, *C. C. P.—Acquiescence—Libel—Error in name of defendant—Amendment by final judgment.*] (Affirming the judgment of the Court of Review, M.L.R., 3 S.C. 23.) *Held*, (1.) The rule contained in Art. 352, C. C. P., which says that no trial is fixed until the facts to be enquired into by the jury have been assigned, is one to be strictly followed; and where a motion by plaintiff to reform the assignment of facts was granted after the day for the trial was fixed, this was an irregularity which the defendants were entitled to urge, unless it appeared that they had suffered no injustice by the error. But in the present case, the defendants had waived

PROCEDURE—*Continued.*

their right to object by acquiescing in proceeding to trial, and by consenting that a bystander should serve on the jury when it appeared that sufficient jurors were not present to form a jury. (2.) Where the publisher of a libel was summoned by a wrong name, and he appeared in that name, and, without disclosing his correct name, pleaded not guilty, such plea put in issue only the fact of publication and the innuendoes, and the verdict rendered against him by the jury could not be set aside on the ground that it was founded upon evidence of what was done by another person. (3.) The judges of the Superior Court sitting in Review, were right in granting, at the final judgment, the plaintiff's motion to insert the correct name. (4.) It was not misdirection for the judge to charge the jury, that by law they should find the article to have been published falsely and maliciously, inasmuch as the defendants did not plead and prove the truth of it. *Mail Printing & Publishing Co. & Canada Shipping Co.*, 225.

—— *Motion by garnishee, in appeal, for leave to make new declaration.*] Where the contestation by intervenants of a garnishee's declaration has been dismissed, and the judgment dismissing it has been appealed from, the Court of Appeal will not entertain an application by the garnishee to be permitted to set aside the former declaration and make a new one. *Fairbanks & O'Halloran*, 163.

—— *Motion for judgment on verdict.*] *See* INSURANCE, 362.

—— *Proceedings for extradition of fugitives.*] *See* EXTRADITION, 145.

—— *Putting husband of defendant in the cause.*] Where the plaintiff was ordered, by a judgment of the Court, to bring the husband of the female defendant personally into the cause, the service of a new writ and declaration setting forth the demand in full, upon both husband and wife, was held sufficient. *Myler & Styles*, 116

PROMISE OF SALE. *See* SALE.

PROMISSORY NOTE.

Action on "bon"—Consideration.] Where a *bon*, made to represent the value of a share in a business, purchased by the plaintiff, was endorsed and transferred to the plaintiff by the vendor: *held*, that the plaintiff could not sue the vendor on the *bon* while at the same time he retained the share acquired by him in the business, which was represented by the *bon*. *Cridiford & Bulmer*, 293.

—— *Loss of—Negotiable instrument filed as exhibit.*] Where the bill of exchange on which the action was based, filed by the plaintiff as an exhibit, disappeared from the prothonotary's office: *held*, that the plaintiff was entitled to judgment for the amount, notwithstanding the loss of the instrument, on giving security to the parties liable, as provided by C. C. 2316. *Lewis & Walters*, 256.

PUBLIC MEETINGS.

Publication of reports of proceedings.] *See* LIBEL AND SLANDER, 41.

RAILWAY.

Animals straying on the track—Responsibility of railway company—Cattle guards.] When the employees in charge of the trains of a railway company discover animals upon the track they are bound to exercise proper care and prudence to prevent injury to them, and a mere slackening of speed will not be considered sufficient to relieve them from responsibility. (2.) No requisition or writing was necessary to put defendants in default for non-compliance with Consolidated Railway Act, 1879, sec. 16, as amended by 46 Vic., cap. 24, sec. 9. (3.) A railway company is liable for animals and cattle killed or injured by getting on the track of the railway in consequence of the absence of cattle guards, without reference to whether such animals were, as between their owners and the public, lawfully on the highway. *Pontiac Pacific Junction Railway Co. & Brady*, 346.

—— *Railway bridge and railway track—40 Vic. (Q.) ch. 29, ss. 326 and 327—Injunction—Extension of town limits to middle of navigable river.*] The clause in the Act of incorporation of the town of St. John's, P.Q., extending the limits of the town to the middle of the Richelieu river, a navigable river, is *intra vires* of the local legislature. (2.) The portion of the railway bridge built over the Richelieu, and the railway track of the company appellant, within the limits of the town of St. John's as above defined, are subject to taxation by the municipality as well as the land on which the bridge and track are constructed. (This holding reversed by Supreme Court, 14 Can. S. C. R. 288.) *Central Vermont Railway Co. & Town of St. Johns*, 466.

—— *Fees of counsel at arbitration.*] *See* ARBITRATION, 404.

—— *See* PLEADING, 283.

REGISTRATION.

Erroneous noting of deed by Registrar.] Where subrogation is given by the terms of a deed, the erroneous noting of the deed by the Registrar as a discharge, and the granting by him of erroneous certificates, cannot prejudice the party subrogated. *Desrosiers & Lamb*, 45.

RESPONSIBILITY. *See* RAILWAY.

SALE.

Description of property—"West side" of river—Change of course.] Where a deed conveyed all the land of lot 10 to be found on "the west side of the river" which runs through the lot, all the land on the west side according to the general direction of the river through the lot was included, although in consequence of a bend in the stream and a change of course from south to north, a portion of such land lay geographically on the east side of the curve. *Eaton & Murphy*, 337.

—— *Hypothec—Clause of "franc et quitte."*] In an action to oblige the vendor to execute a deed of sale of real estate, or pay damages;

SALE—*Continued.*

where the vendor's agent wrote to the purchaser as follows :— " I can offer you the house at $4,300 on the following terms ; $1,000 cash, $1,000 in about two years ; balance $2,300, mortgage on ground, can remain as long as buyer requires." *Held*, that this was equivalent to the clause of *franc et quitte* with the exception of the hypothec mentioned in the letter, and that the vendor thereby promised and was bound to give a clear title with the exception only of the $2,300 ; and he not having executed such deed, and having sold the property to a third party, the judgment which condemned the vendor to pay $300 damages was confirmed. *Gauthier & Ritchie*, 422.

—— *Promise of sale—Acceptance—Lapse of time.*] The appellant, on the 28th July, by a writing, offered certain property to the respondent for $50,000 ; $8,000 of which to be paid cash on passing deed,—" this offer shall remain open to the 10th August next." The respondent sent a letter to the appellant on the 10th August stating that he accepted, but did not make any tender, or put the appellant *en demeure* to pass a deed. *Held*, that it was the duty of respondent to put the appellant *en demeure* to pass a deed on or before the 10th of August, and to tender the $8,000, and this not having been done, the offer, or promise of sale, became ineffective by lapse of time. *Munro & Dufresne*, 176.

—— *Sale of goods by sample—Latent defect—Complaint by purchaser—C. C. Art.* 1530—*Reasonable diligence.*] Wine was sold by sample, and accepted by the buyer without comparison, and paid for, and part of it resold by him. *Held*, that the buyer was not entitled to tender back the wine, after the lapse of more than a year, on the ground that it was of inferior quality. *Guest & Douglas*, 242.

—— *Simulation—Evidence—Purchaser in good faith.*] The appellant (plaintiff) sought to recover machinery transferred to one Joseph Kieffer by deed of sale before notary, on the ground that the deed was simulated, and that the appellant was the real owner of the machinery, Joseph Kieffer being merely his *prête-nom.* One White intervened and alleged a purchase of the machinery by him from Kieffer. *Held* (affirming the judgment of TORRANCE, J., M. L. R., 1 S. C. 284), that the sale to Kieffer could not be set aside by any evidence less strong than the deed of sale, and that even the admission by Kieffer that the sale was simulated (if such admission existed, which was not the case) could not affect the rights of the purchaser in good faith from Kieffer. *Whitehead & Kieffer*, 236.

—— *Of substituted property.*] *See* SUBSTITUTION, 451.

ST. JOHN'S, P.Q., TOWN OF. *See* RAILWAY, 466.

SHIPPING.

Right to freight—Mortgagee of ship—Privilege for necessary supplies.] (Reversing the decision of the Superior Court, M. L. R., 3 S. C. 424.) (1.) Where there are two distinct hirings of a vessel, the

SHIPPING—*Continued.*

voyage under each hiring is a separate transaction, and freight upon the first hiring is earned by the vessel's arrival and readiness to deliver at the port of destination thereunder, although by the second hiring she may be engaged to convey her cargo to another port without unshipping the same at the first port. (2.) Freight so earned may be collected by the master of the vessel, he being also principal owner, and may be applied by him in payment of an antecedent debt owed by him. (3.) The furnishers of necessary supplies upon a completed voyage, having, prior to possession taken by the mortgagee, obtained a draft from the master and principal owner upon the consignees, covering the amount of such supplies, thereby obtain an assignment of freight earned upon such voyage *pro tanto* and are entitled to receive the same in priority to the mortgagee. (4.) The mortgagee of a vessel, in taking possession, becomes entitled to all freight accruing due subject to the claim for necessary supplies for the last voyage, which is privileged, and ranks before him. His rights are not greater than the owner's rights. *Pickford & Dart*, 70.

STATUTORY PRIVILEGE.

Action en dénonciation de nouvel œuvre—Statutory privilege to maintain toll-bridge—Infringement.] A statutory privilege was accorded (by 26 Vic., c. 32) to a person, his heirs and assigns, to levy tolls on a toll-bridge erected by him over a river, and by the statute according such privilege, it was enacted (sect. 10) "that after the "bridge shall be open for the use of the public, no person shall "erect or cause to be erected any bridge or bridges, or maintain "or cause to be maintained any means of communication "for the carriage of any person, cattle or carriage whatsoever, "*for hire*, across the said branch of the river Yamaska, at the "place above mentioned, anywhere within one mile above and "one mile and a half below the said bridge, under penalty, etc., "provided that nothing in this Act shall be construed to deprive "the public of the right of crossing the said river within the "limits aforesaid, by fording, or in canoes or otherwise, without "payment." A large number of persons built a subscription bridge within the limits of the statutory privilege, avowedly with the object of avoiding the use of the toll-bridge and depriving the owner of the benefit of his privilege. *Held*, that this was an indirect mode of defeating the statutory privilege, and that the defendants should be condemned to demolish the bridge by them constructed. *Girard & Bélanger*, 104.

SUBSTITUTION.

Sale of substituted property—Formalities.] (1.) The ordinance of substitutions of 1747 never was in force in Canada; and according to the law which existed in France before the ordinance of 1747, and in Canada before the enactment of the Civil Code, any *grevé de substitution*, might, upon judicial authorization

SUBSTITUTION—*Continued.*

duly obtained, alienate the immoveables of the substitution for necessary cause and to prevent the sale thereof by the sheriff; and such alienation was final. (2.) Before the Civil Code, the consent of the tutor or curator to the substitution, at the sale of substituted property, was sufficient; the concurrence of a tutor to the substitutes then born was not required. (3.) The fact that all the relatives residing in the district were not summoned to a family council, will not render the proceedings null, where the omission to summon all the relatives was not intentional, and no prejudice was caused thereby to the minors. (4.) The order of the judge or prothonotary on the advice of a family council covers all antecedent irregularities as regards the rights of third parties. (5.) Absence of consent by substitutes who were of age at the time of the authorization to sell can be invoked only by themselves in their own behalf, and does not invalidate the sale as regards the substitutes who were duly represented. *Caty & Perrault*, 451.

SUCCESSION. *See* EXECUTOR, 319.

TANNERY. *See* NUISANCE, 197.

TAXES.

Imposed by municipal by-laws for the payment of interest and creation of sinking fund for redemption of municipal debentures.] *See* EXEMPTION FROM TAXATION, 20.

—— *See* EXEMPTION FROM TAXES, 1.

TAXATION OF RAILWAY BRIDGE. *See* RAILWAY, 466.

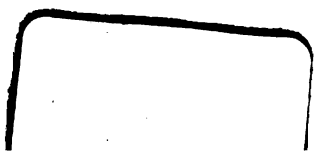
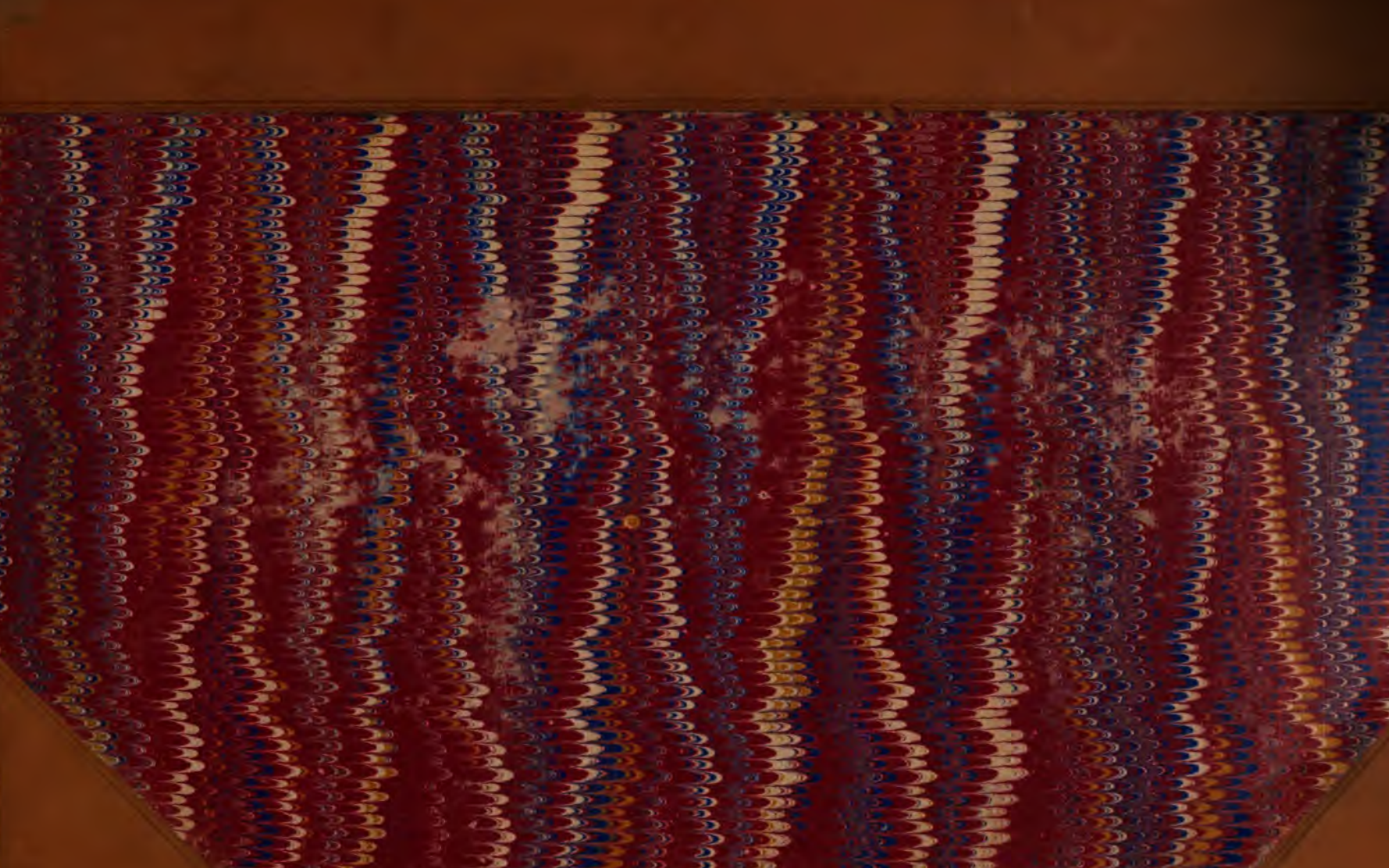
TELEGRAPH COMPANY.

Transmission of libellous matter.] *See* LIBEL AND SLANDER, 122.

TOLL-BRIDGE.

Statutory privilege of levying tolls.] *See* STATUTORY PRIVILEGE, 104.

VAGRANCY. *See* CRIMINAL LAW, 325.

VENDOR AND PURCHASER. *See* SALE.

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